CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 229

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 26, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1939.

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ol. 1]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December Term, 1932

No. 17340

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY

vs.

UNITED STATES OF AMERICA

DOCKET ENTRIES

1933

eb. 18: Petition for Judgment, filed.

18: Notice of filing petition for judgment, filed.

18: Affidavit as to service of copy of petition, filed.

ay 29: Answer to petition, filed.

ly 24: Appearance of E. W. Wells for defendant, filed.

ol. 2] 1933

ly 24: Praecipe to place case on Trial List filed.

ov. 14: Praecipe to place case on list for trial before court without a Jury (Tucker Act) filed.

1936

or, 24: Praecipe to place case on Trial List filed.

1937

eb. 2: Trial before the court without a jury—Witnesses sworn.

3: Trial Resumed.

8: Argued sur pleadings and proofs.

ar. 13: Opinion Welsh, J., granting judgment for plaintiff, filed.

31: Findings of fact and conclusions of law filed.

31: Judgment in favor of plaintiff filed.

ay 6: Defendant's request for findings of fact and conclusions of law filed.

ay 14: Bill of Exceptions and Order of Court approving same filed.

ne 11: Petition by defendant for leave to withdraw bill of exceptions, etc., filed.

11: Order of Court granting prayer of petition filed.

DOCKET ENTRIES—Continued

June 18: Petition for appeal and order of Court allowing appeal filed.
" 18: Exception and Order of Court allowing exception filed.

[fol. 3] 1937
June 18: Assignment of Errors filed.
" 18: Copy of Notice of Appeal filed.
" 18: Citation allowed and issued.
July 1: Citation returned: "service accepted" and filed.
" 14: Motion for extension of time for filing etc. bill of exceptions and Order of Court extending time for 50 days from July 24, 1937, filed.
Sept. 13: Order of Court extending term of Court for purpose of filing Bill of Exceptions to Oct. 13, 1937, filed.
" 28: Plaintiff's requests for findings of fact and conclusions of law, filed.
" 28: Defendant's motion for judgment filed.
Oct. 11: Praecipe for Transcript of Record filed.
" 13: Bill of Exceptions and Order of Court sealing same filed.
" 18: Stenographer's transcript of hearing of May 14, 1937, re: Bill of Exceptions, filed.
" 18: Amended praecipe for Transcript of Record filed.

[fol. 4] IN UNITED STATES DISTRICT COURT

PETITION—Filed Feb. 18, 1933

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, The Real Estate-Land Title and Trust Company, respectfully shows:

1. Your petitioner is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at the Southwest Corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania.

2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795) your petitioner on January 15, 1929, filed with the then Collector of Internal

Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928.

3. The amount of net income reported on the said income tax return filed by your petitioner for the fiscal year ending October 31, 1928 as aforesaid, was $2,551,676.91, upon which amount of net income there was determined to be due on the said return for the said fiscal year the sum of $312,592.67, income tax.

4. The amount of income tax determined to be due as aforesaid, for the fiscal year ending October 31, 1928, was [fol. 5] assessed against petitioner, and was paid by petitioner to the then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following installments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

5. Petitioner avers that during the calendar year 1929 a representative from the office of the Internal Revenue Agent in Charge at Philadelphia, made an examination in connection with the income tax return filed by petitioner for the fiscal year ending October 31, 1928 as aforesaid, and as a result of such examination, determined an additional income tax against petitioner for the said fiscal year amounting to $865.06, which additional income tax was in due course assessed against petitioner.

6. Petitioner avers that the said additional income tax amounting to $865.06 together with interest thereon amounting to $83.31, was paid by petitioner to the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on September 3, 1930, in response to a demand therefor by the said Collector.

7. Petitioner avers that the Real Estate Title Insurance and Trust Company of Philadelphia, a corporation with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of the said company, the West End Trust Company, a corporation with its principal

[fol. 6] office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of the said company, and the Land Title and Trust Company, a corporation, with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of the said company, entered into an agreement of consolidation and merger, which agreement was dated October 3, 1927, under the provisions of which it was agreed inter alia, that upon the due approval of the said agreement by the holders of a majority in amount of the entire capital stock of each of the said corporations at special meetings of the stockholders thereof, duly called and held for that purpose, the filing of certificates thereof and a copy of the said agreement in the office of the Secretary of the Commonwealth, and the issuing of Letters Patent thereon by the Governor, a merger of the said three above mentioned companies shall be deemed to have taken place, and the said corporation shall be one corporation under the name adopted in and by the said agreement, namely, The Real Estate-Land Title and Trust Company, possessing all and singular the rights, privileges and franchises vested in each of the said companies, and all estate and property, real and personal, and the rights of action of each of said corporations shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title and Trust Company without any further act or deed.

8. Petitioner avers that the merger of the said three companies into The Real Estate-Land Title and Trust Company was effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania, approved the 3rd day of May, A. D. 1909, P. L. 408, and supplements thereto.

[fol. 7] 9. Petitioner avers that on the 31st day of October, 1927, Letters Patent were issued by the Governor of the Commonwealth of Pennsylvania to The Real Estate-Land Title and Trust Company, said Letters Patent being recorded in the Office of the Recorder of Deeds in and for the County of Philadelphia in Charter Book No. 97, page 521, and that all of the rights, privileges and franchises, and all of the estate and property, real and personal, of each of the said corporations, namely, the Real Estate Title Insurance and Trust Company, the West End Trust Company and the Land Title and Trust Company, became

transferred to and vested in the said The Real Estate-Land Title and Trust Company under the provisions of the said Act of May 3, 1909, P. L. 408.

10. Petitioner avers that the organization meeting of the Directors of The Real Estate-Land Title and Trust Company was held on the 31st day of October 1927, and that the said Real Estate-Land Title and Trust Company opened for business on November 1, 1927.

11. Petitioner avers that the said Land Title and Trust Company, one of the above-named companies, prior to the merger of the said company with the other companies above named to form The Real Estate-Land Title and Trust Company, carried on, inter alia, the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets at the time of the said merger a title insurance plant. Petitioner further avers that the Real Estate Title Insurance and Trust Company, prior to the merger with the other companies above named to form The Real Estate-[fol. 8] Land Title and Trust Company, carried on, inter alia, the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets at the date of the said merger a title insurance plant.

12. Petitioner avers that for the purposes of the said merger the title insurance plant then owned by the Real Estate Title Insurance and Trust Company, and the title insurance plant then owned by the Land Title and Trust Company were each valued at $800,000.00, and were taken into the new corporation, petitioner herein, at that valuation.

13. Petitioner avers that the title insurance plant formerly owner by the Land Title and Trust Company could not be operated as expeditiously and as economically as the plant formerly owned by the Real Estate Title Insurance and Trust Company, and further avers that the title insurance plant formerly owned by the Land Title and Trust Company was not kept up-to-date by petitioner.

14. Petitioner avers that the title insurance plant acquired by petitioner from the Land Title and Trust Company at the time of the merger, with the exception however of a few maps and other papers that could be readily merged with the title insurance plant formerly owned by

the Real Estate Title Insurance and Trust Company, became obsolete during the fiscal year ending October 31, 1928, and was abandoned by petitioner during the said year.

15. Petitioner avers that at the expiration of the fiscal year ending October 31, 1928, the said title insurance plant formerly owned by the Land Title and Trust Company had no market value and no salvage value.

[fol. 9] 16. Petitioner avers that the said title insurance plant formerly owned by the Land Title and Trust Company was originally installed by the said Land Title and Trust Company during the years 1886 and 1887. Petitioner avers that the value of the said title insurance plant on March 1, 1913 was $1,250,000.00, and further avers that the said Land Title and Trust Company received no allowances for depreciation on the said plant during the period March 1, 1913 to October 31, 1927, the date of the merger.

17. Petitioner avers that the merger or consolidation of the said Real Estate Title Insurance and Trust Company, West End Trust Company and the Land Title and Trust Company above mentioned, was a transaction in which no gain or loss was recognized to the merging companies under the provisions of the Revenue Act properly applicable thereto, and therefore the basis for determining loss due to obsolescence in connection with the said title insurance plan, is the same basis as would have been used by the Land Title and Trust Company for determining profit or loss in connection with the sale or other disposition of the said title insurance plant.

18. Petitioner avers that on or about December 12, 1930, petitioner filed with the then Collector of Internal Revenue in Philadelphia for transmission to the Commissioner of Internal Revenue, its claim for refund of income tax for the fiscal year ending October 31, 1928, in the amount of $153,125.00, on Form 843 alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the title insurance plant formerly owned by the Land Title [fol. 10] and Trust Company during the said year, copy of the said claim for refund being hereto attached and marked Exhibit "A".

19. The Commissioner of Internal Revenue refused to refund to petitioner the said amount of $153,125.00, or any

other amount, and on the 20th day of February 1931, the Commissioner of Internal Revenue disallowed the said claim for refund filed by petitioner for the fiscal year ending October 31, 1928 as aforesaid, copy of letter advising petitioner that its claim would be rejected, and copy of letter advising that it had been disallowed being hereto attached and marked Exhibits "B" and "C".

20. Petitioner avers that the action of the Commissioner of Internal Revenue in disallowing the said claim for refund filed by petitioner as aforesaid for the fiscal year ending October 31, 1928, was illegal and erroneous.

21. Petitioner avers that the action of the Commissioner of Internal Revenue, through his agents and/or representatives, in refusing to allow a deduction in the amount of $1,250,000.00 for the reasons herein set forth in determining petitioner's net income for the fiscal year ending October 31, 1928, was illegal and erroneous.

22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year.

23. Petitioner avers that the assessment and collection [fol. 11] of income tax against petitioner for the fiscal year ending October 31, 1928 in the amount of $313,457.73 was erroneous and illegal, in that the amount of income tax properly payable by petitioner for the said fiscal year was not in excess of $160,332.73.

24. Your petitioner therefore claims there is due and owing to it the sum of $153,125.00, with interest on $865.06 thereof from September 3, 1930; interest on $78,148.16 thereof from December 15, 1929, and interest on $74,111.78 thereof from July 14, 1929, on account of income tax paid by it for the fiscal year ending October 31, 1928 as aforesaid. Your petitioner also claims that there is due and owing to it the sum of $83.31 representing interest paid on the additional assessment of tax for the said year paid by petitioner on September 3, 1930, with interest on the said amount of $83.31 from September 3, 1930.

25. The income tax for the recovery of which this action is brought is an Internal Revenue Tax which was paid to a former Collector of Internal Revenue for the First District of Pennsylvania, which former Collector is now dead, and no part thereof was paid to the Collector of Internal Revenue for the First District of Pennsylvania now in office.

Wherefore your petitioner prays for a judgment or decree against the United States upon the facts and law in this proceeding for the sum of $153,208.31 with interest on $948.37 thereof from September 3, 1930, interest on $78,-148.16 thereof from December 15, 1929, and interest on $74,111.78 thereof from July 14, 1929, together with its [fol. 12] reasonable costs and disbursements, and for such other and further relief in the premises as may be just.

The Real Estate-Land Title and Trust Company, by W. S. Johnson, Petitioner. Saul, Ewing, Remick & Saul, by J. A. Lamorelle, Attorneys for Petitioner.

Duly sworn to by W. S. Johnson. Jurat omitted in printing.

[fol. 13] EXHIBIT "A" TO PETITION

(Execute Separate Form for Each Tax Period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Important
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Claim for

☐ Abatement of Tax Assessed
☐ Credit against Outstanding Assessments
X☐ Refund of Taxes Illegally Collected
☐ Refund of Amounts Paid for Stamps Used in Error or Excess

Notice to Collector
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative unit
[ ]
Stamp here
Collector's Notation
District [ ]
Account number [ ]
Date Received [ ]
Stamp here
Collector of Internal Revenue.

[fol. 14] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Type or Print

The Real Estate-Land Title and Trust Company,
(Name of taxpayer or purchaser of stamps.)

....

(Residence—give street and number as well as city or town and State.)

S. W. Corner Broad and Chestnut Streets, Philadelphia, Pa.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From: November 1	1927
To: October 31	1928

1. Business in which engaged Banking and Trust
2. Character of assessment or tax Income (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $313,457.73
("or stamps purchased" struck out)
4. Reduction of Tax Liability requested (Income and Profits Tax) $153,125.00
5. Amount to be abated .... $..........
6. Amount to be refunded (or such greater amount as is legally refundable) $153,125.00
7. Dates of payment (see Collector's receipts or indorse- [fol. 15] ments of canceled checks) 1/15/29; 4/15/29; 7/14/29; 10/15/29; 9/3/30.
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed Philadelphia, Pa.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $ ....
11. Unpaid assessment against which credit is asked; period from .... to .... $ ....

Deponent verily believes that this application should be allowed for the following reasons:

Taxpayer avers that the Real Estate Title Insurance and Trust Company of Philadelphia, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, the West End Trust Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, and The Land Title and Trust Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, entered into an agreement of consolidation and merger, which agreement was dated the 3rd day of October 1927, under the provisions of which the said three companies and the said Directors agreed, inter alia, that upon the due approval of the said agreement by the holders of a majority in amount of the entire capital stock of each of said corporations at special meetings of the Stockholders thereof, duly called and held for that purpose, [fol. 16] the filing of certificates thereof and a copy of the said agreement in the office of the Secretary of the Commonwealth, and the issuing of Letters Patent thereon by the Governor, a merger of the said three above mentioned companies shall be deemed to have taken place, and the said corporations shall be one corporation under the name adopted in and by the said agreement, namely, The Real Estate-Land Title and Trust Company, possessing all and singular the rights, privileges and franchises vested in each of the said companies, and all estate and property, real and personal, and the rights of action of each of said corporations shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title and Trust Company, without any further act or deed.

Taxpayer avers that on the 31st day of October 1927, Letters Patent were duly issued by the Secretary of the Commonwealth of Pennsylvania, said Letters Patent being

recorded in the Office of the Recorder of Deeds in and for the County of Philadelphia in Charter Book No. 97, page 521, and that all of the rights, privileges and franchises and all of the estate and property, real and personal of each of the said corporations, became transferred to and vested in the said The Real Estate-Land Title and Trust Company.

Taxpayer avers that the organization meeting of the Directors of The Real Estate-Land Title and Trust Company was held on the 31st day of October 1927, at 3.15 P. M., and that the said The Real Estate-Land Title and Trust Company began business on November 1, 1927.

Taxpayer avers that The Land Title and Trust Company, one of the above named companies, prior to the merger of the said company with the other companies to form The [fol. 17] Real Estate-Land Title and Trust Company, carried on the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets, at the date of the said merger, a title insurance plant. Taxpayer further avers that the Real Estate Title Insurance and Trust Company, prior to the merger with the other companies above mentioned to form The Real Estate-Land Title and Trust Company, carried on the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets at the date of the said merger, a title plant.

Taxpayer avers that for the purposes of the said merger the title plant then owned by the Real Estate Title Insurance and Trust Company was valued at $800,000, and the title plant then owned by The Land Title and Trust Company was valued at $800,000.

Taxpayer avers that in order to carry on the business of insuring titles to real estate in Philadelphia it was not necessary to have two title insurance plants, and, therefore, it did not keep up-to-date the plant formerly owned by The Land Title and Trust Company. Taxpayer avers that the plant formerly owned by The Land Title and Trust Company, while a complete plant, could not be operated as expeditiously and as economically as the plant formerly owned by the Real Estate Title Insurance and Trust Company. Taxpayer therefore avers that since the title plant formerly owned by The Land Title and Trust Company was not kept up-to-date during the fiscal year ending October 31, 1928, it became obsolete during the said year, and taxpayer therefore is entitled to a loss due to obsolescence of the said plant during the said year.

[fol. 18] Taxpayer avers that the merger or consolidation of the said companies above mentioned was a reorganization within the meaning of the provisions of the Revenue Act properly applicable thereto, and that the basis for determining loss in connection with the said plant is the same basis as would have been used by The Land Title and Trust Company for determining profit or loss in connection with the sale or other disposition of the said plant.

Taxpayer avers that the original plant was installed in 1886 and 1887, and taxpayer is advised that the value of the said plant on March 1, 1913 was $1,250,000.

Taxpayer therefore claims a loss for income tax purposes for the fiscal year ending October 31, 1928, in the amount of $1,250,000, on account of obsolescence of the said title plant.

Taxpayer avers that for the fiscal year ending October 31, 1928, it paid income tax as follows:

January	15, 1929	$78,148.17
April	15, 1929	78,148.17
July	14, 1929	78,148.17
December	15, 1929	78,148.16
September	3, 1930	865.06

Taxpayer further avers that the payment of $865.06 on September 3, 1930, was the payment of an additional assessment, at which time taxpayer paid $83.31 interest.

~~Taxpayer therefore respectfully requests the refund of~~ tax in the amount of $153,125, with interest on the said amount from the respective dates of payment, and also requests the refund of $83.31 representing interest paid on September 3, 1930, with interest thereon from the date of said payment.

(Attach additional sheets if necessary.)

[fol. 19] Signed: The Real Estate-Land Title and Trust Company, by: W. S. Johnson, Vice Pres., Samuel L. Hayes.

Sworn to and subscribed before me this 12th day of November, 1930.

Elizabeth M. King, Notary Public (Title). (Seal.)

My Commission expires Mar. 16, 1933.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without Charge.)

c2—11704.

EXHIBIT "B" TO PETITION

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to

IT:AR:B-6
LBW

Feb. 11, 1931.

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

[fol. 20] Sirs:

Your claim for the refund of $153,125.00 income tax for the fiscal year ended October 31, 1928, has been examined and will be rejected for the following reasons:

Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned; that the plant had a value of $1,250,000.00, and, therefore, a loss on account of obsolescence should be allowed in this amount.

In an assessment letter from the Bureau dated June 6, 1930, this question was considered; also your contentions were considered in conference in this office on April 30, 1930 and on May 12, 1930. Your contentions were denied in each case. As no additional information has been submitted that would justify the Bureau in changing its previous determination, the claim will be rejected.

The rejection of this claim will appear officially on the next list for your district to be approved by the Commissioner.

Respectfully, J. C. Wilmer, Deputy Commissioner,
by H. B. Robinson, Head of Division.

[fol. 21] EXHIBIT "C" TO PETITION

Treasury Department, Washington, Office of Commissioner of Internal Revenue IT:C:CC-

Feb. 20 1931

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

In re: Refund Claim for year 10/31/28, Amount $153,125.00

Sirs:

Your claim for refund of taxes, above referred to, was disallowed by the Commissioner on a schedule dated February 20, 1931.

Respectfully, J. C. Wilmer, Deputy Commissioner, By T. F. Langley, Head of Division.

[fol. 22] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING PETITION FOR JUDGMENT

Filed Feb. 18, 1937

To the Honorable, the Attorney General of the United States, and to the Honorable the United States Attorney for the Eastern District of Pennsylvania:

Sirs:

Please take notice that the within Petition was duly filed with the Clerk of the District Court of the United States for the Eastern District of Pennsylvania on the 18th day of February, 1933, which Court has jurisdiction of the case set forth in the said Petition and in which district plaintiff has its principal office.

Very truly yours, Saul, Ewing, Remick & Saul, By J. N. Ewing, Attorneys for Plaintiff-Petitioner.

[fol. 23] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE

Filed Feb. 18, 1933

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Joseph A. Lamorelle, being duly sworn according to law, deposes and says, that he is a member of the bar of the Supreme Court of Pennsylvania; that he is a member of the firm of Saul, Ewing, Remick & Saul, attorneys for petitioner in the above entitled proceedings, and that he served a copy of the petition of The Real Estate-Land Title and Trust Company vs. the United States of America on the United States Attorney for the Eastern District of Pennsylvania by handing the said copy to Mrs. R. M. Adams in charge of the office of the said United States Attorney for the Eastern District of Pennsylvania, on the 18th day of February 1933.

Deponent further avers that service was made on the Attorney General of the United States by mailing a copy of the said petition to him by registered letter on the 18th day of February 1933.

(s) Joseph A. Lamorelle.

Sworn to and subscribed before me this 18th day of February, 1933.

E. G. Johnson, Deputy Clerk, District Court United States, Eastern District of Pennsylvania. (Seal.)

[fol. 24] IN UNITED STATES DISTRICT COURT

ANSWER TO PETITION

Filed May 29, 1933

And now comes the United States of America by its attorney, Edward W. Wells, United States Attorney in and for the Eastern District of Pennsylvania, and says that it is the defendant in the above entitled cause, and that it has a just, true, complete and legal defense to the whole of Claimant's Petition of the following character and nature:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted, with the exception that dates of payment were as follows: January 16, 1929, April 16, 1929, July 16, 1929 and December 16, 1929.

5. Admitted.

6. Admitted, with the exception that the date of payment is September 6, 1930.

7. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 7 of Petition, and if material demands due proof upon the trial of this cause.

8. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 8 of Petition, and if material demands due proof upon the trial of this cause.

9. Defendant has no knowledge or means of knowing the [fol. 25] truth of the averments in paragraph 9 of Petition, and if material demands due proof upon the trial of this cause.

10. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 10 of Petition, and if material demands due proof upon the trial of this cause.

11. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 11 of Petition, and if material demands due proof upon the trial of this cause.

12. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 12 of Petition, and if material demands due proof upon the trial of this cause.

13. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 13 of Petition, and if material demands due proof upon the trial of this cause.

14. Denied. Defendant avers that said plant never became obsolete and never was abandoned.

15. Denied. Defendant avers that said Title Insurance plant had a market value and also a salvage value as of October 31, 1928.

16. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 16, and if material demands due proof thereof upon the trial of this cause.

17. Defendant has no knowledge or means of knowing the truth of the averments in paragraph 17, and if material

[fol. 26] demands due proof thereof upon the trial of this cause.

18. Admitted.

19. Admitted.

20. Denied. Defendant avers that the action of the Commissioner was proper, legal and lawful.

21. Denied. Defendant avers that the action of the Commissioner was proper, legal and lawful.

22. Denied. Defendant avers that plaintiff was not entitled to a deduction as set forth in paragraph 22 of Petition, due to the fact that there was no obsolescence and no abandonment; that an attempt by the plaintiff to seek as a deduction an alleged total value of an abstract plant, the purchase of which had been consummated during the same fiscal year for which plaintiff seeks this deduction.

23. Denied. Defendant avers that the assessment and collection of the income tax was proper, lawful and legal.

24. Denied.

25. Admitted.

Wherefore, it is denied that any sum or sums are owing to the claimant from defendant.

Edward W. Wells, United States Attorney.

[fol. 27] *Duly sworn to by Edward W. Wells. Jurat omitted in printing.*

[fol. 28] In United States District Court, for the Eastern District of Pennsylvania

No. 17340

December Sessions, 1932

The Real Estate-Land Title and Trust Company

v.

United States of America.

Bill of Exceptions—Filed October 13, 1937

Be it remembered that at the trial of the above-entitled cause in this Court, at the regular December, 1936, session

thereof, held in the City of Philadelphia, Pennsylvania, before the Honorable George A. Welsh, judge presiding, Joseph N. Ewing, Esquire, and Joseph A. Lamorelle, Esquire (Messrs. Saul, Ewing, Remick & Saul), appearing as attorneys for the plaintiff, and Lester L. Gibson, Esquire, Special Assistant to the Attorney General, Thomas J. Curtin, Esquire, Assistant United States Attorney, and Francis T. Donahoe, Chief of Defense Group, Bureau of In-
[fol. 29] ternal Revenue, appearing for the defendant, the following proceedings were had:

The case was submitted to the Court partly on an agreed statement of certain facts, plus documents made exhibits attached thereto, and on certain oral testimony and documentary evidence. The said agreed statement of facts (caption omitted) is as follows:

Agreed Statement of Facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this action, provided, however, that this stipulation shall be without prejudice to the right of each party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true; and the right of each party is hereby reserved to object to the relevancy, comptency and/or materiality of any and all of the facts so stipulated to be taken as true.

1. The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above-entitled proceeding, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at the Southwest corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania.

2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795), plaintiff-petitioner herein, on January 15, 1929, filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928, a photostatic copy of which is at-
[fol. 30] tached hereto, marked Exhibit "A," and by this

reference made a part hereof, and a part of the evidence in this proceeding.

3. The amount of net income reported on the said income tax return filed by the said Real Estate-Land Title and Trust Company for the fiscal year ending October 31, 1928, as aforesaid, was $2,551,776.91, upon which amount of net income there was shown due on the said return for the said fiscal year Federal income tax in the amount of $312,592.67.

4. The said amount of Federal income tax, namely, $312,592.67, shown due as aforesaid for the fiscal year ending October 31, 1928, was assessed against the said Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, and was paid by the said Real Estate-Land Title and Trust Company to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following instalments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

5. During the calendar year 1929 a representative from the office of the Internal Revenue Agent in Charge at Philadelphia made an examination in connection with the Federal income tax return filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928, as aforesaid, and as a result of such examination recommended an additional [fol. 31] Federal income tax against plaintiff-petitioner for the said fiscal year in the amount of $865.06, which additional Federal income tax was in due course assessed against plaintiff-petitioner herein by the Commissioner of Internal Revenue, a copy of the letter from David Burnet, Deputy Commissioner of Internal Revenue, dated March 20, 1930, and a copy of the letter from Robert H. Lucas, Commissioner of Internal Revenue dated June 6, 1930, being hereto attached and marked respectively Exhibits "B" and "C", and hereby made a part hereof and a part of the evidence in this proceeding.

6. The said additional Federal income tax amounting to $865.06, together with interest thereon amounting to $83.31,

was paid by plaintiff-petitioner herein to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, on September 3, 1930, in response to a demand therefor by the said Collector.

7. The Real Estate Title Insurance and Trust Company of Philadelphia, a corporation with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of that company, the West End Trust Company, a corporation with its principal office in Philadelphia, Pennsylvania and a majority of the Board of Directors of that company, and the Land Title and Trust Company, a corporation with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of that company, entered into an agreement of consolidation and merger, which agreement was dated October 3, 1927, under the provisions of which it was agreed, inter alia, that upon the due approval of the said agreement by the holders of a [fol. 32] majority in amount of the entire capital stock of each of the said corporations at special meetings of the stockholders thereof, duly called and held for that purpose, the filing of certificates thereof and a copy of the said agreement in the office of the Secretary of the Commonwealth, and the issuing of Letters Patent thereon by the Governor, a merger of the three above-mentioned companies shall be deemed to have taken place, and the said corporations parties to the said agreement shall be one corporation under the name adopted in and by the said agreement, namely, The Real Estate-Land Title and Trust Company, possessing all and singular the rights, privileges and franchises vested in each of the said companies; and all estate and property, real and personal, and the rights of action of each of said corporations, as set forth in said agreement, shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title and Trust Company without any further act or deed, a copy of said agreement dated October 3, 1927, being hereto attached, marked Exhibit "D", and by this reference made a part hereof and a part of the evidence in this proceeding.

8. The merger and consolidation of the said three companies, to wit, the Real Estate Title Insurance and Trust Company of Philadelphia, the West End Trust Company and the Land Title and Trust Company, into The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, was

effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the 3d day of May, A. D. 1909, P. L. 408, and supplements thereto.

[fol. 33] 9. The necessary special meetings of stockholders of the said companies, namely, the Real Estate Title Insurance and Trust Company of Philadelphia, the West End Trust Company and the Land Title and Trust Company, having been duly called and held, at each of which meetings the necessary approval of stockholders to the said agreement of consolidation and merger was obtained, and the necessary certificates together with a copy of the said agreement of consolidation and merger dated October 3, 1927, having been filed in the office of the Secretary of the Commonwealth, Letters patent were issued by the Governor of the Commonwealth of Pennsylvania to the Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, on October 31, 1927 (said Letters Patent being recorded in the Office of the Recorder of Deeds in and for the County of Philadelphia in Charter Book No. 97, Page 521), whereupon a merger of the said Real Estate Title Insurance and Trust Company of Philadelphia, the said West End Trust Company and the said Land Title and Trust Company took place, and all of the rights, privileges and franchises, and all of the assets, estate and property, real and personal, of each of the said corporations, namely, the Real Estate Title Insurance and Trust Company of Philadelphia, the West End Trust Company and the Land Title and Trust Company, as set forth in said agreement, became transferred to and vested in the said The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, under the provisions of the said Act of May 3, 1909, P. L. 408, and supplements thereto, copy of the said Letters Patent issued by the Governor of the Commonwealth of Pennsylvania to The Real Estate-Land Title and Trust Company as afore- [fol. 34] said, being hereto attached, marked Exhibit "E," and by this reference made a part hereof and a part of the evidence in this proceeding.

10. All of the terms and provisions of the said agreement of merger and consolidation dated October 3, 1937, as aforesaid, were performed and carried out by the respective parties thereto as provided in the said agreement. The organization meeting of the Directors of The Real Estate-Land Title and Trust Company, plaintiff-petitioner

herein, was held at 3:15 P. M. on the 31st day of October, 1927, and the said The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, opened for business on November 1, 1927.

11. Prior to the said merger the said Real Estate Title Insurance and Trust Company of Philadelphia and the said Land Title and Trust Company each carried on its books an asset account captioned "title plant" in the amounts of $143,000.00 and $275,000.00, respectively. For the purpose of the aforesaid merger, the subject matter of said asset account entitled "title plant" of the Real Estate Title Insurance and Trust Company of Philadelphia was appreciated $657,000.00, or to a total amount of $800,000.00, and the subject matter of said asset account entitled "title plant" of the said Land Title and Trust Company was appreciated $525,000.00, or to a total amount of $800,000.00. The subject matter of each of said assets accounts entitled "title plant" was acquired by the said plaintiff-petitioner herein from the said Real Estate Title Insurance and Trust Company and the said Land Title and Trust Company, re- [fol. 35] spectively, at the time of and as a part of the said merger, under the provisions of the Act of May 3, 1909, P. L. 408, and supplements thereto, as part of the assets of these companies at the valuation of $800,000.00 each, and said valuations were accepted and acted upon in determining the distribution of the stock of the new or merged corporation, (plaintiff-petitioner herein) between the stockholders of the corporations, parties to the merger, to whom all of the capital stock of the plaintiff-petitioner was issued. As of the date of the said merger the plaintiff-petitioner in this case entered on its books as an asset "title plant, $1,600,000.00." No other asset directly attributable or necessary to the conduct of title searching, certification, insurance, conveyancing or settlements was entered on the books of the consolidated or merged corporation.

12. At the time of the aforesaid merger the Land Title and Trust Company had issued a total of 342,067 policies of title insurance and the Real Estate Title Insurance and Trust Company had issued a total of 436,950 policies of title insurance.

The parties to the merger knew before the merger was effected that the new or merged corporation was about to acquire two title plants designed and used for the same gen-

eral purpose by two of the merging corporations, i. e., the Real Estate Title Insurance and Trust Company and the Land Title and Trust Company.

13. The said title insurance plant formerly owned by the said Land Title and Trust Company and acquired by plaintiff-petitioner at the time of the said merger, as aforesaid, was acquired by the said Land Title and Trust Company [fol. 36] during the years 1886 and 1887 at a cost of $251,509.84. In the years 1888 and 1889 additions to said plant were made by the said Land Title and Trust Company at a cost of $23,455.21. In the year 1890 additions to said plant were made costing $1,086.57. For the period from 1890 to February 28, 1913, there was expended for searches and plant expenses by the said Land Title and Trust Company the sum of at least $317,645.36, which was charged to expense on the books of the said company, as per statement hereto attached and marked Exhibit "F", by reference made a part hereof and a part of the evidence in this proceeding. From February 28, 1913, until the date of the merger of the said companies the expenses incurred by the said Land Title and Trust Company on account of searches and title plant were charged to expense on the books of the said company.

After September 30, 1891, the said title plant was carried on the books of the said Land Title and Trust Company at a valuation of $276,051.62 until September 30, 1897, when this amount was reduced to $275,000.00 — which figure remained the same up to just prior to the merger above referred to.

14. On the books of the Land Title and Trust Company salaries of some of the general officers were charged to the various departments in the following proportions: "Financial Department", one-half; "Title and Conveyancing Department", one-quarter; "Trust Department", one-quarter. Other expenses as well as salaries of some of the general officers were charged directly to the departments to which they applied.

15. Operating statements of the Land Title and Trust Company for the years ended September 30, 1908, 1909, [fol. 37] 1910, 1911 and 1912, and for the six-months period ended March 31, 1913, and balance sheets as of September 30 of each of the years 1907 to 1913, and as of January 31 and February 28, 1913, consisting of eight sheets, are at-

tached hereto, marked Exhibits "G" and "H", and by reference made a part hereof and a part of the evidence in this proceeding.

16. Prior to the merger aforesaid, the Land Title and Trust Company, in its Federal capital stock tax returns for the years 1917 to 1926, inclusive, returned the book value of its title plant and the fair value of its "Title Plant" in the amount of $275,000.00 for all of said years.

17. The said merger of the said Real Estate Title Insurance and Trust Company, the said West End Trust Company and the said Land Title and Trust Company was a transaction in which no gain or loss to any of the said companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act of Congress properly applicable thereto.

18. The said title insurance plant owned by the said Land Title and Trust Company at the time of the said merger, was originally installed by the said Land Title and Trust Company during the years 1886 and 1887. The said Land Title and Trust Company received no deduction for income tax purposes for depreciation, wear and tear, obsolescence, armortization or depletion on the said plant or any part thereof during the period March 1, 1913, to and including October 31, 1927, the date of the merger above referred to, and no deduction was properly allowable for income tax [fol. 38] purposes for depreciation, wear and tear, obsolescence, amortization or depletion on the said plant or any part thereof during the said period.

19. In arriving at the amount of income tax claimed by the Commissioner of Internal Revenue and actually paid to the Collector of Internal Revenue at Philadelphia, Pennsylvania, by the plaintiff-petitioner for its fiscal year ending October 31, 1928, no deduction was allowed by the Commissioner of Internal Revenue in determining the amount of net income upon which said tax was computed, for obsolescence, abandonment, depletion, amortization or depreciation of the said title insurance plant formerly owned by the said Land Title and Trust Company, which title insurance plant, by the said merger of the companies above named, had become the property of the plaintiff-petitioner.

20. On or about December 12, 1930, the plaintiff-petitioner herein filed with the then Collector of Internal Revenue at

Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claim for refund of Federal income tax for the fiscal year ending October 31, 1928, in the amount of $153,125.00, on Form 843, alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the said title insurance plant (formerly owned by the Land Title and Trust Company) during the said fiscal year, copy of the said claim for refund being hereto attached, marked Exhibit "I", and by reference made a part hereof and a part of the evidence in this proceeding.

21. The then Commissioner of Internal Revenue refused [fol. 39] to refund to plaintiff-petitioner herein the said amount of $153,125.00, or any other amount for the fiscal year ending October 31, 1928, and on the 20th day of February, 1931, the then Commissioner of Internal Revenue disallowed the said claim for refund filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928, as aforesaid, copy of the letter advising plaintiff-petitioner that its claim would be rejected, and copy of letter advising that it had been disallowed being hereto attached, marked Exhibits "J" and "K", respectively, and by reference made parts hereof and parts of the evidence in this proceeding.

22. This action was brought for the recovery of Federal income tax, which income tax is an internal revenue tax and was collected by Joseph S. McLaughlin as Collector of Internal Revenue for the First District of Pennsylvania, the said Joseph S. McLaughlin having been Collector of Internal Revenue for the First District of Pennsylvania at the times of the payment of the income tax and interest, for the recovery of which this proceeding was instituted. The said Joseph S. McLaughlin was dead at the time this proceeding was commenced and therefore not in office as Collector of Internal Revenue at such time, and no part of the said income tax or interest, for the recovery of which this proceeding was instituted, was paid to the Collector of Internal Revenue for the First District of Pennsylvania who was in office at the time this proceeding was commenced.

23. This proceeding was commenced after the passage of the Revenue Act of 1921, for the recovery of an internal [fol. 40] revenue tax alleged by plaintiff-petitioner to have

been erroneously and illegally assessed and collected. This suit was brought within six years after the right accrued for which claim is made in this proceeding.

Saul, Ewing, Remick & Saul, (Sgnd.) by Joseph Neff Ewing, Attorney for Plaintiff-Petitioner. Charles D. McAvoy, United States Attorney, by Thomas J. Curtin, Lester L. Gibson, Special Asst. to the Attorney General, Attorneys for the United States.

A complete list of all the documents received in evidence as exhibits to the foregoing agreed statement of facts is as follows:

Exhibit No.	Stipulation Par. No.	Description
A	2	Return of income for fiscal year ending October 31, 1928.
B	5	Letter dated March 20, 1930, from David Burnet, Deputy Commissioner of Internal Revenue.
C	5	Letter dated June 6, 1930, from Robert H. Lucas, Commissioner of Internal Revenue.
D	7	Agreement of consolidation and merger, dated October 3, 1927.
[fol. 41] E	9	Letters patent issued by the Governor of the Commonwealth of Pennsylvania to The Real Estate-Land Title and Trust Company.
F	13	Statement relative to amounts expended for searches and plant expenses by Land Title and Trust Company.
G	15	Operating statements of the Land Title and Trust Company for years ended September 30, 1908, 1909, 1910, 1911 and 1912, and for the six-months period ended March 31, 1913.
H	15	Balance sheets as of September 30 of each of the years 1907 to 1913, and as of January 31 and February 28, 1913, consisting of eight sheets, of Land Title and Trust Company.

Exhibit No.	Stipulation Par. No.	Description
I	20	Claim for refund for income tax for the fiscal year ended October 31, 1928, in the amount of $153,125.00.
J	21	Letter to plaintiff-petitioner from Commissioner of Internal Revenue advising that claim for refund would be rejected.
K	21	Letter advising that claim for refund had been disallowed.

[fol. 42] Copies of the foregoing papers are attached hereto, designated as above, and made a part of this bill of exceptions.

Prior to the taking of the defendant's evidence, the following supplemental agreed statement of facts was read into the record (Tr. 170-174):

Supplemental Agreed Statement of Facts

It is admitted that the plaintiff filed a report on shares with the Commonwealth of Pennsylvania for two months ending December 31, 1927, in which it listed, among other assets, an item entitled "Title Plant, $1,600,000," the amount at which this item was carried on the balance sheet of the plaintiff at that time. Plaintiff made no claim for the reduction of this amount at that time.

Plaintiff filed its report of shares with the Commonwealth of Pennsylvania for the calendar years 1928, 1929, and 1930, in each of which reports it listed among other assets, an item entitled "Title Plant" in the amount of $1,550,000 for 1928; $1,500,000 for 1929; and $1,450,000 for 1930; and made no claim for reduction of these amounts.

The plaintiff filed its report on shares with the Commonwealth of Pennsylvania for the calendar year 1931, in which it listed, among other assets, an item entitled "Title Plant" in the amount of $1,400,000, and attached to said report a statement including the following remarks:

"Our Balance Sheet will also show an item of $3,569,812.02 under 'Other Assets'. As to this particular item we

desire to make some special explanations toward which we direct your attention and consideration. We take it that all companies such as ours carry such an item or investment and in this item from time to time are investments which good sound business purposes require shall be amor- [fol. 43] tized or depreciated, and then finally charged off. As to many of these items, there is frequently no question as to their value or as to their having certain value or no value whatever. Good accounting, as well as Income Tax requirements, dictates that they shall not be immediately disposed of. As to some items making up this larger item, we now desire to direct your attention to the following:

Relating to the item designated as 'Other Assets', there will be found under 'Remarks', at the foot of page 3, a separate statement showing just what makes up and constitutes the sum of $3,569,812.02. Included therein is an item designated as 'Title Plant'—$1,400,000—which represents the balance remaining of a total figure of $1,600,000 at which certain duplicate Title Plant equipment and records were valued viz. $800,000 each in the merger of November 1, 1927, of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and The West End Trust Company, which merger resulted in the formation of this present Corporation. These Title Plants being duplicates, one of them was of no further use, and was immediately discarded; so that this item which appeared to have a then present value of $1,600,000 at once depreciated to a then present value of $800,000. The discarded plant having no further value is being amortized. The item of $1,400,000 is thus made up of $800,000, representing the book value of the plant still in use, and $600,000 which represents the reduced value at which the discarded plant was carried on our books as of December 31st, 1931.

It will at once be seen that the discarded plant is of no value to the Corporation and represents actually no asset value, and we are requesting that a deduction or exemption [fol. 44] of this item be allowed in arriving at the actual value of our shares."

The plaintiff filed its report on shares with the Commonwealth of Pennsylvania for the calendar year 1932, in which it listed, among other assets, a certain Title plant in the amount of $1,350,000 and attached to said report a statement including the following remarks:

"Our Balance Sheet will also show an item of $3,740,601.41 under 'Other Assets'. As to this particular item, we desire to make some special explanations toward which we direct your attention and consideration. We take it that all companies such as ours carry such an item or investment and in this item from time to time are investments which good sound business purposes require shall be amortized or depreciated, and then finally charged off. As to many of these items, there is frequently no question as to their value or as to their having certain value or no value whatever. Good accounting, as well as Income Tax requirements, dictates that they shall not be immediately disposed of. As to some items making up this larger item, we now desire to direct your attention to the following:

Relating to the item designated as 'Other Assets', there will be found under 'Remarks', at the foot of page 3, a separate statement showing just what makes up and constitutes the sum of $3,740,601.41. Included therein is an item designated as 'Title Plant'—$1,350,000—which represents the balance remaining of a total figure of $1,600,000 at which certain duplicate Title Plant equipment and records were valued, viz:—$800,000 each in the merger of November 1st, 1927, of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and The [fol. 45] West End Trust Company, which merger resulted in the formation of this present Corporation. These Title Plants being duplicates, one of them was of no further use, and was immediately discarded, so that this item which appeared to have a then present value of $1,600,000 at once depreciated to a then present value of $800,000. The discarded plant having no further value is being amortized. The item of $1,350,000 is thus made up of $800,000 representing the book value of the plant still in use, and $550,000 which represents the reduced value at which the discarded plant was carried on our books as of December 31st, 1932.

It will at once be seen that the discarded plant is of no value to the Corporation and represents actually no asset value, and we are requesting that a deduction or exemption of this item be allowed in arriving at the actual value of our shares."

[fol. 46] **Plaintiff's Evidence**

J. Willison Smith, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ewing:

I am president of the Land Title Bank and Trust Company. The corporation which is now the Land Title Bank and Trust Company is the corporation which resulted from the merger in 1927 of the Land Title and Trust Company, the West End Trust Company, and the Real Estate Title Insurance and Trust Company, all of which merged, and at that time were known under the name of Real Estate-Land Title and Trust Company.

I have been president of the new corporation since November 1, 1927, when it started to do business; prior to November 1, 1927, I was president of the West End Trust Company, one of the companies which entered into the merger, which position I occupied from September 1, 1921; prior to that time I was with the old Land Title and Trust Company, from April, 1895, to 1921; I was with the West End Trust Company until 1927 and then became president of the Real Estate-Land Title and Trust Company, which was a result of the merger of the other two, and the Real Estate Title Insurance and Trust Company. I first started as an office boy with the Land Title and Trust Company, and went through various steps in that Company and in the West End Trust Company until I reached my present posi- [fol. 47] tion. (Tr. 16-17.) As a boy I worked part of the time in the title plant at the old Land Title and Trust Company and also in the application section, filing applications, as we called them then, which contained the papers relating to title applications. I learned, in a general way, at an early age, the title insurance business as I went through the Company. At the time of the merger on November 1, 1927, of the three corporations, I took into the new corporation the title plants belonging to both the Real Estate Title Insurance and Trust Company and the Land Title and Trust Company.

The first two corporations to negotiate about the merger in 1927 were the West End and the Real Estate Title Insurance Company, which had practically gotten together.

They had gotten together in terms of an agreement for merger, and later, about October 3, 1927, the Land Title and Trust Company was added, making the triple merger of the three companies effective. After the plans and agreements of October 3, 1927, became effective, then the plan would have taken and did take place on November 1, 1927, by a merger of the three companies. A two company merger had been agreed upon when the Land Title and Trust Company came into the picture. The Land Title requested to get into the picture in the latter part of September, 1927. The agreements were actually signed by the Directors of the three companies on the 3d day of October, 1927, so we only had the question of the Land Title and Trust Company entering into the merger for a period of just about two weeks. Prior to the Land Title and Trust Company's coming in, we had only one title plant involved, Real Estate Title and Insurance Company; the West End Trust Com- [fol. 48] pany did not have a title plant. In the early days the West End insured titles; not many. It did not have a plant, but worked with other title companies. It practically abandoned this later. There was practically no title insurance issued by the West End Trust Company after about 1920, as I recall; it had to have titles insured through another company with a title plant. The directors of these three corporations signed an agreement to merge on October 3, 1927, which was later ratified by the stockholders of the three corporations and a new charter issued on October 31, 1927, to the Real Estate-Land Title and Trust Company. The following day, November 1, 1927, the new or merged corporation, under the name of The Real Estate-Land Title and Trust Company, commenced to do business. (Tr. 18-20.)

We found ourselves with two title plants, the one from the Real Estate Title Insurance and Trust Company, and the one which came with the Land Title and Trust Company. The question of the disposition of these title plants was referred to Mr. Bonsall, vice president of the Land Title and Trust Company, who was an authority on title insurance, and Mr. Cowdrick, vice president of the Real Estate Title and Trust Company, with their assistants, to determine what was the best use to make of the plants; whether they could be used together or in part, or what disposition should be made, if any; what parts of the plant, thinking that two of them might be used either together

or partly. We had no definite plan about them when the merger agreement was signed. With the Land Title coming in so late into the picture, we did not have time to consider much about the practical operation of the two plants, nor [fol. 49] what disposition, if any, should be made of either or both of the plants or parts of the plants. My idea was that we would use the Land Title plant, because I have always considered it a more complete plant than any other plant in the City; it had a background which went all the way back to William Penn, the original grant, and my personal opinion was that we would use that plant more than we would use any other combination. I was familiar with that plant, having worked in the Land Title Company, and had no familiarity with the Real Estate Title plant. Mr. Bonsall was requested to take up the subject and make a report, which he did, in the latter part of October, toward the end of October, 1927. I don't recall definitely who worked with Mr. Bonsall, but I think Mr. Mecutchen, who was the title officer, worked with Mr. Bonsall on that report, and they studied the situation with the Real Estate Title officers. (Tr. 21-22.) The report was that from the practical standpoint, and an economical standpoint, the Real Estate Title plant should be tested out and determine whether the economy would make it worth while to continue that plant and not use—until that trial period was over—anything in the way of the Land Title plant. The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of the coming month, the month of November, and I think December, although I can't say definitely on that. Economy of operation of the Real Estate Title plant was so convincing that it was definitely determined later that the plant of the Real Estate Title should be the working plant. The [fol. 50] plant of the Land Title had been placed in the basement of 517 Chestnut Street, which was the old office of the Real Estate Title Insurance and Trust Company, and now the downtown office of the Land Title Bank and Trust Company.

We did not keep the Land Title plant up-to-date. It was allowed to run down, as far as keeping it up to the daily records, and judgments and plans and abstracts from the daily records, and so forth. (Tr. 23.)

Q. At what time did you start to allow the Land Title plant to go down?

A. Well, my recollection was about the time of the latter part of October, about that time. But parts of the Land Title plant were used during the early part of November, as I recall it, of 1927, to take care of some situations which were necessary at that particular time of the month.

Q. In other words, I understood that you testified that they continued to use it, but did they continue to keep up the records in it?

A. No, they did not.

Q. From sometime, you say, in the latter part of October?

A. That is correct.

Q. What happened? You say it was brought down and stored at 517 Chestnut Street. Was any effort made to sell the plant?

A. We had a request for a price on the plant. One of the companies in Philadelphia that did not have a plant, and wanted to go into the title insurance business, felt—they did at the time—made inquiry, and had several conversations with Samuel Barker, who was then the president of the Bankers Trust Company. They considered taking [fol. 51] the plant over, but no offer was definitely made. My recollection is the price quoted was a million dollars. And nothing developed out of that in the way of completion of negotiations, such as sale or any other development.

By the Court:

Q. Who mentioned the million dollars, your company or the inquiring company?

A. I mentioned the million dollars.

Q. A million dollars?

A. Yes. What we would take for the plant—and I said I would consider an offer of a million dollars. And I think I had at least three talks with Mr. Barker, but none of them developed. He thought the price was such that if it was brought up to date—this was in the Spring of '28, is my recollection—and having run down during that period, from the merger to that date, it would have to be brought back to an actual working plant. And in order to do that the copies of all the records between that period, when we had ceased to carry on daily, would have to be brought up to the date at which it was taken over.

Q. That would be from the previous October?

A. October, 1927, to whatever the period was in early 1928.

By Mr. Ewing:

Q. Did you ever have any offer to purchase it?

A. We never had any offer to purchase it, no.

Q. What was the ultimate disposition of that plant?

A. It is still there without use, without practically any use.

Q. When did you cease to use it?

A. I don't believe that plant has been used—of course [fol. 52] I did not actually physically handle the situation, but to the best of my recollection it hasn't been used since 1928, early part of 1928. (Tr. 24-26.)

Mr. Gibson: He doesn't seem to know when it was put into disuse. He doesn't give a definite date. I move that it be stricken.

Mr. Ewing: It is there for what it is worth—early part of 1928.

The Court: I understood Mr. Smith to say before that it might have been used for references but hadn't been brought down to date.

By the Court:

Q. Is that correct?

A. That is correct.

Q. You haven't kept it up to date. You might have used it for some references?

A. Yes, that is right.

Cross-examination.

By Mr. Gibson:

Q. Mr. Smith, did you ever advertise this plant for sale?

A. I don't recall having advertised it.

Q. You quoted to Mr. Barker a price of a million dollars?

A. Yes, sir.

Q. When was that?

A. That must have been in the early part of 1928.

Q. I believe you stated that you were not familiar with the details of the plant. Do you know of your own knowl-

[fol. 53] edge whether it is being used or any part thereof for reference at this time?

A. From actual personal experience, I haven't seen the plant nor do I know that it is being used, excepting as reports have been made to me. (Tr. 27-28.)

Q. You don't know of your personal knowledge?

A. No, I do not.

Q. Mr. Smith, before I forget it, I want to ask you this question: At the date of this merger, how many complete title abstract plants were located in the City of Philadelphia?

A. At the date of the merger I would say that there were three. That is my recollection. That would be the Land Title, the Real Estate Title, and the Commonwealth Title.

Q. They were the three complete title abstract plants in the City of Philadelphia?

A. Yes, There were other plants but they weren't to cover your term, complete.

Q. They weren't complete?

A. No.

Q. Was it not the custom, Mr. Smith, and is now, for title insurance companies who do not have a complete title abstract plant, to go to a company who has a complete title abstract plant to make searches for them?

A. Searches were frequently made. What they call the general search and locality searches, yes.

Q. For companies who did not have title plants?

A. That is correct.

Q. With regard to the profit derived from these searches, the fees paid, what do you say with respect to being a paying proposition to the title company having complete plants?

[fol. 54] A. I don't believe I quite catch your thought.

Q. In other words, Mr. Smith——

The Court: Whether they come through another company.

Mr. Gibson: That is it.

The Court: You want to know what would be the profit enuring to the company that has the plant.

Mr. Gibson: Yes, sir.

The Witness: Well, there is a profit of course, but that would depend on the volume of business. If the volume of business was low, of course the cost of putting those searches out wouldn't represent any profit. If the volume was great there would be a profit. Just what that amount

would be, I am not prepared to say without referring to the books.

By Mr. Gibson:

Q. If the company having a complete title plant depended on searches for outside companies, or fees and income, would it be a profitable business for a company such as yours?

A. The combination of title insurance and searches?

Q. Yes.

A. With proper volume it would be a profitable thing to do.

Q. What would that volume have to be?

A. I couldn't tell you offhand. I wouldn't know without referring to the records, and possibly having some of our [fol. 55] men who are dealing with that feature of it say.

Q. Isn't it a fact that the profit derived from a title insurance plant comes more largely from the insurance end of it rather than the title services?

A. The premium, yes, sir. (Tr. 29-30.)

Q. And a company having a title search plant, is it in a position to command business and goodwill—is it in a better position than an insurance company without a search plant, in that regard?

A. Well, we think the plant companies are better prepared to command the business than otherwise, than when they don't have the plant.

Q. They do get the business?

A. Yes.

Q. Large insurance companies and mortgage companies, they prefer to go to a company that own the complete title search plant, isn't that true?

A. I think that is true, yes.

Q. Under the position in which your company found itself upon this merger, Mr. Smith, it would have been an equal effort to keep the both plants up to date, wouldn't it?

A. I did not so consider it.

Q. Why?

A. When the negotiations were made.

Q. Why?

A. I figured that with the advantage of having the opportunity to use parts of two plants we would be in a posi-

tion to—at the head of the heap on title insurance and the advantages in putting title insurance out.

Q. You still have that advantage insofar as reputation and insurance accruing to the Land Title Insurance—done [fol. 56] by the Land Title Insurance Company prior to this merger?

A. We had a position prior to the merger, of course, as the Land Title and the Real Estate Title also had its position. But when the merger took place it became a practical question in economics and service to the public—economic to the company and service to the public—as to what we should use in the way of developing our plants, of taking the best advantage of information we had from either or both of the plants. And, as I say, the decision was that the Real Estate Title plant was the most economical, at the same time serviceable to the extent of its need.

Q. But your reputation and standing with the public was enhanced and is now by the possession of the two—the merger of two of the foremost title insurance plants in the City of Philadelphia, isn't that true?

A. I shouldn't think that is so with respect to the second plant.

Q. Why?

A. Because the trade and those interested in the title insurance, recognize the fact that the Land Title plant has no practical use at this time. (Tr. 31-32.)

Q. Isn't it a fact that all insurance that is to be renewed, all mortgages that are to be renewed, where the insured used the Land Title—wouldn't the old mortgage have the number and the name of the old Land Title and Trust Company, and wouldn't it be natural for that insurance to go to you—that mortgage owner?

A. That would have nothing to do with the plant feature of it. It would be the fact that the insurance had been is-[fol. 57] sued, which carried with it, in the preparation of the title certificate the settlement certificate, and the issuing of the title policy—it would carry out the work far beyond the work of the plant itself. That was merely the foundation.

Q. You don't consider that the part of the title plant, is that your answer?

A. I consider the plant was the foundation of issuing the title insurance, but it was not solely or entirely, by any

means, the whole title system that was necessary to give the settlement certificates and issue the policies. So much of the work of the title plant has to be augmented through searching original records at City Hall.

Q. Yes, but isn't it true that a title plant consists of a separate search of title, exceptions and opinions, and the applications on which the company issued its title insurance policies?

A. I wouldn't say the plant was that. (Tr. 33.)

Q. You wouldn't say that was part of the plant?

A. The title insurance would be, and the information leading up to the developing through the title clerk, and the title examiners, and the title officers.

Q. Then too you did not abandon any part of the applications, such as brief of title. In other words, what is spoken of as bundles, you didn't abandon any of them?

A. No, we still have those.

Q. You still use them?

A. We still use the applications.

Q. But I understand the only thing you abandoned was what we would call just the abstract plant, the search plant itself?

A. That is correct.

[fol. 58] Q. That is the only thing you abandoned in this merger?

A. The plant itself.

Q. Why didn't you abandon the other?

A. What was that?

Q. Why weren't the others abandoned?

A. Because that was a basis of our liability when we issued the policy. We couldn't throw out the records on which claims might afterwards be made.

Q. Don't those various searches and applications save a lot of labor and expense in bringing titles down to date?

A. Yes, they do, because they go right from that date on.

Q. When you have an application you refer not only to The Real Estate-Land Title and Trust Company, the old Real Estate Land Title and Trust Company, which is kept actively in use, but also other applications of the Land Title and Trust, isn't that true, to check one against the other?

A. All our settlement certificates, whether Land Title or Real Estate Title, yes.

By the Court:

Q. Mr. Smith, suppose there is a conveyance of a property on Broad Street this week, and before the merger it was insured by the Land Title Company, where would you go to issue your new policy, bring it up to date?

A. Where would we go?

Q. Yes. What plant would you use?

A. Why, we would use the Real Estate Title plant. The other plant is not in use.

Q. Not in use. Now, if you sold or disposed of the Land Title plant, would the efficiency of your present company be impaired?

[fol. 59] A. It would not, in our opinion.

Q. Now, suppose there is a question of suit, some cloud has appeared on the title, and someone claims compensation or loss under your policy, issued under the Land Title Company, would you use the Land Title Company, would you use the Land Title plant then?

A. We would have no reason to refer to the Land Title plant unless there were some very unusual question that I don't happen to think of now. (Tr. 34-35.)

By Mr. Gibson:

Q. Mr. Smith, his Honor asked you about a piece of property that had been insured by the Land Title. When you got that application for renewal of insurance you would refer to the old Land Title application first, wouldn't you?

A. To the application?

Q. Yes.

A. Which carried with it the papers relating to what the title clerk had done, which is entirely independent of the plant searches.

Q. That application covered the old Land Title service, didn't it?

A. It gave the result of the Land Title service.

By the Court:

Q. Then I suppose if a question came up about whether or not one of your clerks, search clerks, was negligent, you might refer to the Land Title plant to find out whether he had performed his duties properly in making exemptions, and so forth. That is where it would come in?

A. Partly. It was strictly a plant error.

Q. Yes.

A. But there are so many features in the application [fol. 60] feature that counsel has referred to, that you might say the application feature is all inclusive. It is an all inclusive term. If I may just divert for a minute to make it clear, as I see it, the application is taken and that is the beginning of everything. It shows what is to be insured, property and classification of insurance, mortgagee or ground rent owner or what not. Then that would follow through and go to the plant for the search, also be referred to the title clerk for a follow through in taking what the plant gave to them as the result of their searches. And then he would run the title, as we call it, by referring to City Hall for any questions that may be necessary, as the plant slips abstract from City Hall. Then he would write up his settlement certificate, passed by the examiner and by the title officer eventually. But in that application it is a catch-all for everything outside of the plant slips. And all correspondence or legal opinions, settlement certificates, and most anything that would relate to the transaction would be within the application. And we had a certain way in which to file this and knew what to expect of five or six standard items, what paper that would be necessary to put in. I put my early days in on that, so that made me rather familiar with it.

By Mr. Gibson:

Q. Mr. Smith, nevertheless, when you get that application you would first refer to the last application of the old Land Title and Trust Company, and that is where you would begin bringing your title down, wouldn't it?

A. If it had been previously insured by the Land Title, yes. (Tr. 36-37.)

[fol. 61] Q. If it had been previously insured you would have gone to the Real Estate?

A. That is right.

Q. That is where you are using your bundles to check one against the other, don't you?

A. That is right.

Q. When you get an application, you take the application which is most recent?

A. Yes, sir.

Q. If there happened to be one. And you rely on the statement in the affidavit that you find with that bundle?

A. Rely on it?

Q. The affidavit and other statements contained in that application.

A. Yes, that is our basis of further consideration about a new problem.

Q. You take that as a status of the title at the date of the application?

A. That is correct.

Q. As I understand it, Mr. Smith, you set a price to Mr. Barker, who was the president of the Bankers Trust Company?

A. That is right.

Q. At a million dollars, on this plant?

A. That is correct. (Tr. 38.)

Q. Was that for the complete plant?

A. Yes.

Q. Complete title insurance plant?

A. The complete plant, as we term it, which covers the records, block plans and section plans, and so forth, but it did not take into account what you term applications.

Q. It did not take that into account?

A. No.

[fol. 62] Q. Just the search plant?

A. Just the so-called search plant, abstracts of records.

Q. When was it that you say you made this price, in the early part of '28?

A. That is my recollection. (Tr. 39.)

Redirect examination:

We could not have sold the applications. We had policies outstanding, and all the liability we would assume through that insurance would be our only hope of defense on anything that came up—it would have been taken away from us. We had all information in connection with the insurance policies in that file. We have to hold them, and they were not included in the negotiation for sale of the title plant. The price we quoted for the title plant meant the plant proper without the applications. We did not have an offer to buy the title plant; if we had an acceptable offer, we would have sold it—I certainly would have recommended it. The two title plants went into the merger at $800,000; they were worth that much, in our opinion. (Tr. 39-40.)

Recross-examination.

By Mr. Gibson:

Q. You would call $1,000,000, in the early part of 1928, an acceptable offer for your plant?

A. For the title plant, for the Land Title plant.

Q. Not less than a million dollars?

A. I would not say we would not have taken less. That is the price I quoted.

Q. You quoted a million dollars?

[fol. 63] A. Yes, sir.

Q. You did not have an offer to take less?

A. I did not have anyone to come back and offer me less or offer me anything, as a matter of fact.

By the Court:

Q. There hasn't been much need for a plant in the last seven or eight years?

A. No, sir.

Q. With the number of sheriff sales?

A. No.

By Mr. Ewing:

Q. Just to make the record clear, the Land Bank and Trust Company which name you spoke of at the beginning of your testimony, is the same corporation which was previously chartered on October 31, 1927, as The Real Estate Land Title and Trust Company?

A. That is correct. It is merely a change of name. (Tr. 40-41.)

My position in the various title plants during my several employments was as follows:

In 1895 I was employed by the Land Title and Trust Company and became what you might call an assistant custodian of records. That is a big name. But I had charge, with a Miss Irons, who was my superior, of all the applications that had considerable to do also with the abstract slips, T. D.'s. That is a title department search gotten up by the plant, and other papers relating to it. So between the title department itself, as recognized by the title clerks, title examiners, and title officers, I was in touch with them and also with the plant itself. Then subsequently I went into some title work in the way of running some titles,

which brought me in touch with the plant and with the title [fol. 64] department. Afterward I went into the—do you want the complete record—into the building operation section and the title department was closely associated with that. I had very little contact with the plant after that period, which I should say, may have been around 1900 and 1901-1902; I am not sure on that. (Tr. 42-43.)

PIERCE MECUTCHEN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ewing:

I am the title officer of the Land Title Bank and Trust Company, and before the merger on October 31, 1927, was with the Land Title and Trust Company and have been with the new merged company ever since the merger. I was with the Land Title Company since February, 1912, and was made an examiner in the title department when I first went there and have been in the Title Department of the Company ever since. (Tr. 43.)

The witness explained to the Court that the business that is carried on in the title department, and explained in narrative form as follows:

A. I might say with reference to the title records which we had at the Land Title plant, there were what were called block plan books, of which there were 221 at the time of the merger. There were section plates of which there were 77. There were judgment index books.

[fol. 65] By the Court:

Q. What do you call those?

A. Judgment index books, of which there were 273. There were what were known as group index books, of which there were some 150. There were what were called drawers or file cases of block plan slips; and there were some 2,563 of those files containing each somewhere in the neighborhood of 2000 slips. Each of those slips represented an instrument, either a mortgage or a deed or an agreement of some kind which was of record over at

the Recorder of Deed's Office in City Hall. There were also some 74 slips, 74 files of what were called section slips. Those section slips had to do with any deed or other instrument, the description in which ran into more than one block, and, therefore, was numbered and scheduled among the section slips.

I will explain the difference between section and block slips a little later.

There were some 70 files of lien slips, which were mechanics and municipal liens, and tax liens of various kinds, which were located at the plant, and dwelt entirely with such liens. Then there were an immense number of books containing Manila abstracts which were really the basis of the plant entirely, which were abstracts——

By Mr. Gibson:

Q. What kind of abstracts did you say?

A. We spoke of Manila abstracts which were the original abstracts which came from City Hall and which were originally made up when the plant was started, all the way back from 1886 to the time of William Penn.

[fol. 66] By the Court:

Q. Were they abstracts made by the search clerks?

A. They were the abstracts made by those who were at the start engaged to form the title plants. You could call them abstractors, perhaps. And those, of course, were the abstracts of those instructions. And they were all put together so as to form replicas of the various deed books, assignment of mortgage books, mortgage books, release of mortgage books, that were records over at City Hall. Of those I should say there were at least twenty to thirty thousand books, duplicates of books, as to page, and as to the instruments themselves, of those over at City Hall, except that they were in very condensed abstract form. Now, when the plant was started, to explain what was the basis of the plant——

By Mr. Ewing:

Q. Now, what you have described is the title plant?

A. Of the Land Title and Trust Company.

Q. Land Title and Trust Company?

A. Right.

Q. At the time of the merger on October 31, 1927?

A. That is correct.

Q. Now, what I asked you at the outset was to tell about the business in the title department.

A. Well, if you mean to describe how the plant was made up, I was going on to do that after showing the different kinds of assets that we had, or what records we had in the plant. Now, what happened was this: A deed was abstracted on a Manila sheet.

[fol. 67] Q. In other words, Manila merely designates the paper it was written on? (Tr. 44-46.)

A. Designates the paper. And I speak of that because afterwards it was transferred to a very permanent and strong paper sheet, which we have always called a slip. And when it was brought from City Hall it was first checked up from its description with the appropriate block plan and section plate it had reference to. That is why I want to explain those two plants at the outset. The City was divided into a large number of sections, some 77. In each one of those sections was a considerable number of city blocks. On those there was a separate plan made for each one of those sections, which was mounted on a large cardboard backing. On that plan every instrument, every lot I should say, which was the subject of a separate deed at City Hall, and which affected ground in more than one block, was drawn in on that section plate.

There were also block plans made up, a separate plan for each block in the City. Those block plans were put in what were called block plan books. And on those block plans were noted every deed or separate instrument dealing with the separate property or properties that were in that particular block—were drawn in on that particular block plan. And that block plan itself was enumerated as Section 1, we will say, Block 4, that having reference to that particular block as shown in connection with that particular section. And these block plan books were made up so that on the outside of the book was shown the number of the blocks and what their numbers were to the reference to the section in which they were located. And they were kept in such order that it was always possible to pick out [fol. 68] the appropriate block plan book by knowing, from this plate showing all the different sections and the blocks, just where it belonged in that connection.

Now, when the Manila slip abstract came from City Hall, it was located on the appropriate plan book. If there had been an instrument before that date, with the same description, then it would be found not only drawn in on that block plan, but there would be a schedule opposite to that plan on which there were a great many lines fairly close together shown and the number of that particular lot would be on one of those lines; and then along the line in that block schedule would be shown the numbers of other lots out of which the title to that lot came. In other words, the larger lots, the group numbers of those. So that that made quite a comprehensive way of being able to pick out these slips, where they were put after they were typewritten later. That was a scheme of the block plan. (Tr. 47-48.)

The next thing that was done with the Manila slip, after it had been noted on the top of it, the proper section, the proper block number, the proper lot number, if it had already received a lot number because of similar description in a prior instrument, and the number of the deed or other instrument, giving it a number which was consecutive to the last instrument which had been recorded for that particular lot. So there were four notations on the top of each of those slips.

That Manila slip was also noted on what we called a group index, which was a set of books made up for each particular lot throughout the City. And each page was devoted to one particular lot. And on it were noted a reference to this same information and the book and page [fol. 69] of that particular instrument. When that book and page became available after the instrument had been actually transcribed in City Hall into the records; because we got daily these Manila pages, these Manila abstracts, from City Hall, before they were actually written up into the books.

This was followed by a typewriting of the slip, the Manila abstract, into permanent form on the best kind of paper. And that slip was put in its appropriate place in these block slip files, if it was a block slip. If it was an instrument affecting ground in more than one block, then it was put in the section slip files, in its appropriate place.

The effect was this, that when the title to anything particular was desired, the description being given so as to locate it, such description usually being found in an application for title insurance, it was possible for the search

clerk in the plant to go to the block slip file, if it was a lot in a particular block and not a section lot, and pick out all these instruments, deeds, and mortgages—which would all be filed together—affecting that particular lot. Then by reference to the group index, or more particularly to the block plan index, it would be possible to pick out all the related lots in that particular block which represented the back title for that particular smaller lot which was in the application. And it was possible then by reference to the indexes relating to the sections to even go back into the larger tracts which may have been farms in the old days, running into other blocks of ground, but forming part of the back title to the particular smaller lot.

In connection with the plant there was also a series of judgment indexes kept on which a force of clerks were [fol. 70] engaged all the time; and the transcription of the judgments which were taken off every day, also I think in Manila form, but in all events were taken off. Those judgments were placed under the appropriate letter and in the appropriate place, as to any particular name, so that all the judgments relating to any name would be found in the one place on those indexes.

That was another feature of the plant, so as to be able to have a search ordered by the title clerk, who was the one who did that, and who was not connected with that plant, and if he had examined the title to find what judgment liens might still be in existence and still valid against that particular title.

Now, to follow an application through the plant, I would say generally that the application, after being noted in the proper application index, would be turned over to a clerk in the plant who would locate it in the way that I have mentioned; and having found the appropriate section number and block number, and group number, she would get out all the slips, and on the margins of those slips would be noted the numbers of the applications which had been insured, where that particular slip had been examined before, because every slip that had not been previously examined in a prior application would always be expected to be checked up at City Hall by the title clerk when he gets these slips. But, in the meantime, any applications which would show the back title to that back lot, in connection with prior insurances, would be noted, in connection with the slips, and those slips would be sent in with a search that

was noted T. D. I don't know just what those letters stood for. But it was a search, at any rate, which showed the [fol. 71] title stated simply by section block and group numbers, so as to show exactly what those slips had reference to, but was not stated in the books and pages of the instruments. And that search contained also a reference to the actual books and pages of the mortgages and some other information of that kind.

And then the title clerk would check up and find out that the slips that were sent in correspond with the numbers that were shown on that search. And it would be up to him to make up his brief of title from that. And in addition to using that information, they bring them to City Hall to check up the recitals that were found in those instruments which were only stated in very brief form on the Manila abstract; sometimes were only indicated by book and page of the last title—it contained in the recital. And having taken off those recitals in full, he would have to look at the wills and other proceedings in court which might be recited and referred to, to make sure that the proceedings were regular and to get the material that was found in the courts in that connection. And he would be found to take off a very full abstract of such wills in such proceedings and they would form part of his brief. That brief of course was kept with the application. (Tr. 49-52.)

After he had gone over the title in this way and framed his brief from the title that had been examined prior to that time, he would start his brief at that point. He would order his judgment searches, and bankruptcy searches, and similar searches, for liens. And he would then be in a situation, after he got that material back from the plant for those searches were run at the plant, to make up his settlement certificate on which he would set forth any liens that were [fol. 72] found. And then he would set up what objections he may have come to the conclusion existed against the title. Some of those objections were already on the settlement certificate in a printed form, such as accuracy of description and dimensions and some similar printed objections which applied to practically every insurance. The other objections include the call for the deed, and the proper parties that were to make the deed, and of course the 101, I was going to say, objections which may apply, some in this case and another in other cases. But that certificate would then be handed over, along with the material that he had gathered,

and the searches which had come in from the plant, to an examiner. And the examiner would be supposed to check up on all the more important features shown in the brief in the searches, and to make sure that the settlement certificate was in proper form and contained a proper exhibit of what that title really was.

Then if there were any questions which to the examiner seemed to be doubtful or required verification by someone in authority, the matter would be taken up with the title officer or his assistant, and that was the final step in connection with it. The notation by that examiner showing that he had been over it by annexing his initials at the side of the settlement sheet; and the sheet then would be signed by the settlement clerk. And that would be what is known as the inside settlement certificate.

Q. Where is the division between the title plant and the applications?

A. The division was this, that the plant gave in this search, that was called the T. D., a reference to the various deeds and mortgages of record which affected that particu- [fol. 73] lar title; and also the liens in the way of judgments, mortgages, et cetera, that they found as a result of the first search and the running of the later searches ordered by the title clerk. Outside of that the work of what we term the title department itself, the title clerks and examiners and the title officers, was the determination from that material and those records, supplemented by what might be necessary to further that take off at City Hall, what this state of that title was, and the insurance and marketability of it.

Q. Records are kept in the title plant of all those things that would show in the Recorder's Office and Prothonotary's Office and offices of other public officials?

A. That is correct. (Tr. 53-54.)

Q. The applications include all the other information which was gotten together up to the time of issuing the title policy, plus a copy of the title insurance policy?

A. Yes, sir. And included, among other important records, affidavits that were secured from parties in interest which determined the identities of parties, determined the heirs or someone who had been the last owner of the property, and who were now making title to the property as being the proper heirs of that decedent. Those were very important because they were the basis of protection later in con-

nection with any attack made upon the title. And because in some instances they were the means of establishing knowledge on the part of the insured himself as to what the particular lists were, and as to what the facts were in connection with the title.

Q. At the time of the merger in October, 1927, Mr. Ed- [fol. 74] ward H. Bonsall was vice president of the Land Title and Trust Company?

A. That is correct.

Q. And you were responsible to him for the conduct of the title department?

A. Yes, sir. He was my immediate superior.

Q. Mr. Smith testified that Mr. Bonsall and Mr. Cowdrick took up the question of which of the two title plants would be used by the new company. Were you associated with Mr. Bonsall in that work?

A. I went around with him and Mr. Cowdrick. We were shown the various operations that went on in the Real Estate Title plant and the character of its conditions; Mr. Cowdrick asking some questions that were asked by us, particularly by Mr. Bonsall. And it was after that it was concluded to try out the Real Estate Title plant as being the preferable one to use from the standpoint of economy and probably also from the standpoint of speed.

Q. You of course from your work were familiar with the Land Title plant?

A. Yes.

Q. And you and Mr. Bonsall familiarized yourselves with the Real Estate Title plant through Mr. Cowdrick, vice president of the Real Estate Title Company?

A. Yes. And it did not require very long examination. My recollection is that we came to the conclusion after perhaps an hour and a half or two hours visit to the plant down at 517 Chestnut Street.

Q. How did you come to that early conclusion?

A. Well, we came to that conclusion partly as a result of the fact that we, both of us, had been convinced for some [fol. 75] time that the Land Title plant, complete as it was, and admirable as it was in many ways, was a very expensive and uneconomical plant to keep up and maintain. (Tr. 55-56.)

Q. And what did you find with respect to The Real Estate Title plant?

A. The Real Estate Title plant involved far less opera-

tion in connection with the matter of the keeping up of the plant. And I might explain that somewhat like this: They took the Manila abstract from City Hall and they made one entry on the—they made one entry on a book which was similar to the block plan book. They had no group index book. They found it unnecessary to have that. They bound up their Manila slips, without having them typewritten at all, into books which were not counterparts of books at City Hall, so far as having the same slips in the same books as were over at City Hall. And by that I mean that they bound up their slips, all the slips, all the deed slips that went of record a particular day, were bound up together as of that date, and a reference to that date in the appropriate place in the locality search docket, which I think it was called, was the means of checking up and of finding that reference later in getting the title relating to a particular lot.

They did not have the slip system at all. So all that tremendous number of slips that we had, and by that I mean typewritten slips, did not exist in that plant at all.

Q. What was the net result of operation, your relative operation of the two plants?

A. It was, I think, most clearly shown by the difference in the number of employees of the Land Title plant at the time [fol. 76] of the merger and the number of the employees in the Real Estate Title plant. (Tr. 57.)

Q. It took more to operate the Land Title plant?

A. There were about 43 employees in the title plant, as a title plant, not including title clerks or anything of that kind, at the time of the merger.

Q. In what company?

A. I should say in the Real Estate Title plant. And about 124 employees in the Land Title plant.

Q. And they were doing comparitively the same work?

A. They were. The difference being of course the different system and the absence in the Real Estate Title plant of any slip system.

Q. Then I understand you came to the conclusion to use the Real Estate Title plant on account of economy of operation?

A. Yes, sir; that is true.

Q. And what happened to the Land Title plant?

A. The Land Title plant was taken down to 517 Chestnut Street, and the larger part of it was stored in the basement, some portions of it were kept elsewhere. I think the block

plan books were not stored in the basement, but everything else of any importance, that I know of, was stored down there.

By the Court:

Q. Will you describe the basement down there, Mr. Mecutchen?

A. Yes, sir.

Q. That might mean one thing and mean another.

Mr. Ewing: Have you books and specimens to show what is stored there? I would like you to get those. (Tr. 58.)

[fol. 77] The Witness: Will you bring those, the ones that are stored down in the basement?

(Interruption.)

Mr. Ewing: We are ready, Mr. Mecutchen, whenever you are.

The Witness: You want me to state what is in the basement.

By Mr. Ewing:

Q. Describe exactly what the records are that formerly comprised the Land Title and Trust Company title plant, and the cellar in which you said they were stored.

The Court: Pick up one and then the other, in your own way.

The Witness: I have already stated of what the plant consisted of at the time of the merger, but I can go over that.

Mr. Ewing: Well, you have an illustration, I believe.

The Witness: That is correct.

Mr. Ewing: Just briefly.

The Witness: I have here—I think perhaps the Judge might like to see it.

The Court: Yes.

The Witness: A copy of our Manila book that I spoke about. And in connection with this particular matter, here is the slip that took its place.

[fol. 78] The Court: That looks familiar. It takes me back some years ago.

By Mr. Ewing:

Q. That is a book of what dimensions?

A. That is a book of which there must have been not less than forty or fifty thousand stored down in the basement.

Q. How many pages in each book?

A. Well, it shows at the end of the book. The pages of the book itself would be less than the pages of the instrument. But, you see, the last instrument recorded in M. K. P. 573 is what this book is a duplicate of—page 560 of the book at City Hall. It is a little hard to tell how many pages would be found of the Manila abstract, because each Manila abstract may represent an abstract of an instrument which took several pages of the original record. I should say offhand that these books contained something like 150 or 200 pages.

Q. And those pages are what size?

A. These pages I should say were about ten by five.

Q. Inches?

A. Inches.

Q. Now, pass on to the next book.

A. The next book is the group index book of which I have stated how many were down in the—— (Tr. 59-60.)

Q. I think the Judge would like to see it.

A. Yes. Pardon me, sir. (Handing book to the Court.) It contained the reference to a particular group in the block plan, which you will see, Judge, is Section 46 of Block 239, and of the particular group in connection with the particu- [fol. 79] lar slip that I just showed you is 149. And there it shows the books and pages of the slips that were already found in the plant dealing with that title. So if any one of those slips was lost it would be quite possible to get it again by reference to this group index. And that is the principal purpose of that.

By the Court:

Q. How many of these were there?

A. Of those books, the group indexes, there were approximately 150.

By Mr. Ewing:

Q. And how many pages in each one of those books?

A. I would think in the neighborhood of——

The Court:

It goes from 9 to 420.

The Witness:

420?

The Court:

420.

The Witness:

Probably an average of about four hundred.

By Mr. Ewing:

Q. And what size are those pages?

A. Those pages I should judge were about eighteen by twelve.

Q. Inches?

A. Inches.

Q. Now, go right ahead. Have you any other examples of records that are stored?

A. Down there, I think, as I stated before, are found the judgment index books.

Q. Have you one of those here?

A. We haven't one of those. Those were books of about [fol. 80] 8 inches by, I think, about 15, and contained something like a couple of hundred pages each. And that is where the judgments were indexed.

Q. And how many of those were there?

A. Of those judgment index books there were 273.

Q. What other kind of books are there?

A. In addition to that, the only other books, were just as I have stated, the Manila abstracts of which this forms an example, which are replicas of the books at City Hall. But there were large numbers of files containing the slips that I have spoken about, which were block plan slips, section slips, and lien slips.

Q. Have you the number of those?

A. The block plan slip files, there were 2,563, each of which contained in the neighborhood of 2,000 slips. (Tr. 61-62.)

Q. So that would be a total of how many slips in those files?

A. I would judge that would be a total of about 5,000,000 slips. And then there were the drawers of section slips of which there were only 74. Drawers and files I am using synonymously.

Q. The same size?

A. The same size. And about the same number in each file. And then there were lien slips of which there were

70 files. I have one of the lien slips right here to show what it was like. That is not quite as heavy paper, but it was the same general style as the other slip.

Q. And how many of those?

A. I would have to make a reference. Of those there were 70 files.

Q. The same size files?

[fol. 81] A. Containing at least the same number of lien slips.

Q. Anything else?

A. There were the—I think that is all.

Q. And those are all stored, you say, in the basement of 517 Chestnut Street?

A. And the basement of 517 is below the ground floor, like all basements, quite a dark affair, lit up by rather meager electric lights that can be put on. (Tr. 63.)

Q. What size?

A. The electric lights?

Q. No, the room.

A. I am afraid you will have to verify my recollection of that, because it is so cluttered up. It is pretty hard to know how much is room and how much is material in it.

Q. Is there anything else in this basement beside these records of the title plant?

A. Yes, I think there are some other records of the financial department.

Q. Are they separated physically?

A. Separated physically.

Q. Can you between now and tomorrow morning, when we come into court, find out how much space——

A. Yes.

Q. —these records fill in this basement?

A. Yes.

By the Court:

Q. Is that space occupied by persons or just things?

A. Just things, sir.

Q. Just things?

A. I don't think it is——

[fol. 82] The Court:

Has the gentleman from Washington been down to look it over?

Mr. Gibson:

Yes, sir.

Mr. Donahoe:

Yes, sir.

The Court:

If I can get the description I won't be obliged to make a visit. If I cannot, I will have to go down myself.

Mr. Ewing:

I think it would be interesting to your Honor.

The Court:

This is quite important, this stage of it. So if you will note for the purpose of the record as much as you can, both sides, as to the existing conditions there——

Mr. Ewing:

We will get the measurements and put them on the record tomorrow morning.

By the Court:

Q. How was it furnished, Mr. Mecutchen?
A. As far as I know, there is no furniture down there. There are one or two washrooms, something of that kind. But outside of that it is entirely used for storage purposes, as far as my——
Q. No clerks working there?
A. None at all.
Q. No access by the public?
A. No access by the public at all.

By Mr. Ewing:

Q. The place is used for storage only?
A. For storage only; and washrooms for the employees. (Tr. 64-65.)

[fol. 83] Q. You will get the dimensions of the space occupied by these records?
A. I will, sir.
Q. When were the records put down there?

A. The records were taken down there sometime between the second week in October and the end, I think, of the first week in November, or perhaps a little later.

Q. Of what year?

A. Of 1927.

Q. And what happened to them after they were put there? Were they used or not?

A. The only use made of them in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation, what references may have been made from time to time to that plant. (Tr. 66.)

Q. You do know that they looked up some things from time to time?

A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

Q. Did they increase or decrease after the plant was stored there?

A. I think that it decreased as the time went by, so that [fol. 84] there was practically little or no use made of it by the end of the year following the merger.

Q. Where was the plant before it was put down 517?

A. It was on the second floor of the Land Title and Trust Company, and occupied a very large room on the second floor. I should say it occupied about one-third to one-half of the total of the floor space of the second floor of the Land Title Building.

Q. That is at Broad and Chestnut Streets?

A. Broad and Chestnut.

Q. Have you any idea what that floor space would be?

A. No, I haven't. I couldn't give you any really accurate statement.

Q. I would like you to give us that in the morning.

A. I will do my best to do that. Of course the present offices there—that room is not in its former condition, but

I think we can make out about what was covered. (Tr. 67.)

Q. As nearly as you can. What happened to the applications in the Land Title Company when the title plant was moved down 517 Chestnut Street?

A. They were stored on an upper floor.

Q. Where?

A. The applications were stored on the upper floor of The Real Estate-Land Title and Trust Company building at 517 Chestnut Street.

Q. But they have been used?

A. Oh, yes.

Q. Do these books and records which you have described as a part of the title plant, which you said are stored in the basement, include anything which has to do with the applications?

[fol. 85] A. No part of the applications are stored there at all.

Q. The applications which you say are stored in the upper floor are the applications that the Land Title and Trust Company had at the time of the merger?

A. The applications of which we had insurance to titles, as to almost all of them, there might have been a few where the matter didn't go through, were applications made prior to the merger, where the titles had been insured prior to that time.

Q. By the Land Title and Trust Company?

A. By the Land Title and Trust Company.

Q. Since then they have changed the name to The Real Estate-Land Title and Trust Company, first, and since the change of name to the Land Title Bank and Trust Company?

A. That is right. (Tr. 68-69.)

Cross examination.

By Mr. Gibson:

Q. Mr. Mecutchen, you stated that these records were in the basement. You mean that they are still there?

A. Yes, sir.

Q. All the records that the Land Title and Trust Company possessed on the 31st of October, 1927?

A. Yes, sir. All that I have stated that are there now in the basement were stored there at or about that time, in October or November of 1927.

Q. They are accessible to your company?

A. Yes, sir. I think that the slips can be gotten at and are at very infrequent times taken out and some informa- [fol. 86] tion gleaned from them. But, for instance, the matter of the books of Manila abstracts, which were replicas of those at City Hall, those are just in a heap and they are not available at all.

Q. Mr. Mecutchen, just for the information of the Court: These books you referred to as Manila abstracts, aren't those sheets called take-off sheets?

A. Yes.

Q. They are called take-off sheets?

A. Yes, that is correct.

Q. And so far as the efficiency and running of the Land Title and Trust Company plant goes, those sheets, after they had been put on permanent books, they were really of no use except for reference, isn't that true?

A. They were put, of course, on these permanent sheets that we speak about, the slips. And except for the purpose of rechecking——

Q. Yes.

A. —the slips were used and not the Manila abstracts.

Q. Take the ordinary abstract of a country town. He would take his take-off sheets and he would go to the courthouse and get his take-off, and then he would go to the office and put it on one of these books, like the book you have there?

A. Not the books. The books were the means of using those slips and getting at those slips. You see, they were a sort of channel through which to get at the slips themselves, the hundreds that were used.

Q. Those service sheets, those service slips that you transferred the information to, they were really of no use except for checking?

A. I think that is true. I know that we did refer to them when we had our brief, that we referred to a book and page, [fol. 87] and it might be a question of who the parties were. Maybe the brief was not complete, and we would have some doubt, and we would go back and get that particular information. (Tr. 69-70.)

Q. And if you did not have those take-off sheets, as you call them, you could refer to City Hall and get that information, if you want to check?

A. Yes. It was always possible to go to City Hall, as long as we had the permanent sheets, which I have called slips.

Q. And you spoke of liens and judgments. In any of your searches, Mr. Mecutchen, you wouldn't go back beyond the statutory period of limitations on them?

A. No. Judgments were run back for a particular period, which was a period beyond which, if a judgment existed, as it might very well, it would cease to have a lien, if it hadn't been revived within the period we searched.

Q. Therefore those slips, those take-off sheets, a great many of them covered a period which were really of no consequence?

A. I think that is true in quite a good many of those. I personally do not know what they may have done with back take-offs after a certain period of time in the judgment department. That I don't know.

Q. That has the same application to the judgment lien books too, doesn't it?

A. How is that? (Tr. 71.)

Q. The judgment lien book, that would also apply to them?

A. I was speaking of the judgment lien books. Of course the other liens were largely a matter of the mortgages. And the mortgages were quite important as long as they were un- [fol. 88] satisfied, no matter how far back they were.

Q. A great many of the books then were of no further consequence insofar as the information you might desire, on account of the running of the statute of limitations?

A. I think in connection with judgments, they are the only ones that I could think of that were of no importance on account of the lapse of time.

Q. You spoke of this plant, Mr. Mecutchen, being complete and admirable. Your description shows that you had a complete record of everything. That is true, quite true?

A. We had a rather complete record, and it went back, in the matter of deeds, as well as mortgages all the way practically to William Penn. The other plants, so far as I know, including the Real Estate Title plant, in the matter of take-offs and records made from the take-offs did not go back prior to about 1830.

Q. Your plant went further back. The Land Title and Trust plant went further back?

A. Practically back to 1700. Real Estate Title did go back in its mortgages. In fact, the mortgages, I think, all the way back.

Q. The system of running the plant, bringing it down to date, was the same in October, 1927, as it was in 1913, wasn't it?

A. So far as I know, about the same.

Q. You have been with them how long?

A. Since 1912.

Q. Now, you have spoken of the briefs and searches and the applications. They are really the two separate divisions of a title insurance plant, aren't they?

[fol. 89] A. The applications and the briefs and the material kept with the applications, I think, are entirely separate from what I have otherwise designated and delineated as the title plant.

Q. You think the applications are entirely separate from the plant?

A. I do think so; yes, sir.

Q. That is, when you speak of a title search plant?

A. I suppose it could be called a search plant, because even the material that was put on the search, which we call a T. D., and which was turned over to the title clerk by the plant, was in fact, a search showing the deeds and the mortgages with reference to the slips, and the slips show deeds and mortgages to that property. (Tr. 72-73.)

Q. The applications that were taken over in the merger of the Real Estate Title and Trust Company and the Land Title and Trust Company, and the plant which you say was abandoned, are now being used the same as they were prior to the merger, as the occasion arises?

A. I did not quite get that.

Q. As the occasion arises, Mr. Mecutchen, the applications of the Land Title and Trust Company are still being used the same as they were prior to the merger?

A. I would say that was true, sir.

Q. What do you say as to the applications as opposed to the search, search plant, being a business getter? Which is the best business getter?

A. You mean the plant, which I have distinguished as the plant?

Q. Yes.

A. And the applications?

[fol. 90] Q. Yes.

A. Well, there is no doubt that the fact that somebody's title has been insured by our company may be a factor in leading to the next party that gets that title or gets a mortgage on that property bringing the business. But it is by no means the determining factor. The more determining factor is the question of the party who is being insured, the new purchaser or the new mortgagee; the connections that he may have; and more particularly what help he may be given in the matter of the loan given him by some other concern to enable him to purchase the property, if he is a purchaser. That frequently determines the question of where the insurance shall go. And there are other factors which I think are really more important, even in the matter of having insured it before.

Q. What are they?

A. I beg your pardon.

Q. What are they?

A. The other factors?

Q. Yes.

A. I have named one of them. The question of what business may be done by the particular real estate man that handles the transaction for the purchaser; where he is accustomed to transact other business. Sometimes it is a matter of what company he thinks, in other ways, may give him the most—other kind of business. It is a matter of favors, if you choose to put it that way. And I am quite sure that there are a good many factors that enter into it. That, so far as the applications are concerned.

Now, on the matter of the plant, I think——

Q. If it is satisfactory——

[fol. 91] Mr. Ewing: Let him answer.

The Witness: Maybe I did not get your question.

Mr. Ewing: Let him finish his answer. (Tr. 74-75.)

The Witness: On the matter of the plant, I think that the reputation of the particular company for accurate work counts for a very great deal in the matter of getting business. And, of course, a great deal depends also on the amount of capital that the particular company has to back up its insurance.

By Mr. Gibson:

Q. Did the Land Title and Trust Company, prior to the merger, have a reputation for good work and capital behind it?

A. ~~I think~~ it did, yes.

Q. Other things being equal, with respect to the application that you have just stated, isn't it true that the work went to the plant that had the last application?

A. No, I really don't think so, for this reason particularly: That there was very little rebate, if you choose to use that language—there was very little saving of cost in connection with the new purchaser, because the title had been insured by the particular company that he was going to immediately or sometime prior to that time, that the last owner had been insured, who was now conveying. There was practically no allowance unless of recent years it was because the transfer had occurred such a very short time before. So there wasn't any saving of that kind in his go- [fol. 92] ing to the company that insured before. (Tr. 76.)

Q. Was that true of 1913?

A. To tell the truth, I don't remember. I am not sure. I did not have so much to do with the matter of the charges as I did the legal questions.

Q. We are not speaking so much of savings. You mentioned savings.

A. Yes.

Q. It is the business. Everything else being equal, wouldn't a purchaser go to an old customer?

A. I think he would be apt to go to the company that was doing—or the company or companies that were doing the most business in that line.

Q. And he would take a company that had a title search plant in preference to a company without, wouldn't he?

A. Yes, in general I think he would if none of the other factors which I have hinted at came into play. Because it is quite true that there were, to a less extent, in 1913; to a much greater extent in 1927, a great many title companies which were bidding for the business, and which were offering inducements in a great many different ways to have the business come to them instead of to the larger companies.

Q. Who got the business in 1913, the company with the title plants or companies without, the bulk of business?

A. I think the bulk of the business went to the three companies that had the title plants in 1913.

Q. Who were they?

A. They were the Real Estate Title and Trust Company, the Land Title and Trust Company, and the Commonwealth

Title Insurance and Trust Company, which company is no [fol. 93] longer now in existence.

Q. Who got the bulk in 1927?

A. When you say bulk, you mean plant companies as opposed to non-plant companies.

Q. Yes. The plant companies as opposed to non-plant companies got the bulk of the business in 1927?

A. I think that is probably true in Philadelphia, even though there were so many non-plant companies; including of course in that the subsidiaries of the Commonwealth, or Title Company of Philadelphia, as it was then called, which were some five or six different companies, which were getting the benefit of a common plant, no one of which of course—which did not belong to any one of them.

Q. How many plant companies, how many complete plant companies existed in Philadelphia in 1927?

A. I think I better enumerate them as far as I know them. There was the Land Title and Trust Company, the Real Estate Title and Trust Company, the Commonwealth Title Insurance and Trust Company, the Pennsylvania—no, pardon me—the Kensington Title and Trust Company.

Q. Is that in 1927?

A. That is in 1927, before the merger. (Tr. 77-78.)

Q. Was the Kensington Title——

A. I don't know whether I mentioned the Title Company of Philadelphia.

Q. Was the Kensington Company a title company?

A. Do you mean did it have a complete plant?

Q. Yes, sir.

A. I have never seen its plant, so I really am not in a position to speak technically about it. But I have always [fol. 94] understood that it went back a much shorter time than any of the other three plants or four plants that I have mentioned.

Q. As between the plants you mentioned, who got the bulk of the business in 1927?

A. I should think that the Title Company of Philadelphia, our own Land Title and Trust Company and the Real Estate Title and Trust Company and the Commonwealth Title Insurance and Trust Company, those four.

Q. Who got it in '28, after the merger?

A. After the merger the only difference would be that immediately after the merger the Real Estate Title and

Trust Company was of course merged with us, so that there was only one company where there had been two before. And I think it was a very short time after that that the Commonwealth Title Insurance and Trust Company was merged with the Title Company of Philadelphia so as to form the Commonwealth Title Company of Philadelphia. (Tr. 78-79.)

Q. Now, Mr. Mecutchen, all The Real Estate Title and Trust Company and the Land Title and Trust Company and the West End Company—that was the merger?

A. Yes, sir.

Q. All of the financial prestige which formerly belonged to those three separate companies went along with the merger, did it not?

A. Probably that is true, sir.

Q. Isn't it true that that financial prestige back of these two title companies controlled a great deal of the title insurance business?

A. Not any more so than the——

Q. That isn't my question. Didn't it?

[fol. 95] A. I think that it had quite a little to do with the business that we got. And the chances are that a great portion of all the Real Estate Title had secured before, and what we had before became the joint——

Q. In addition to the merged companies, isn't it a fact that The Pennsylvania Campany had a very large interest in this merged company?

A. Yes. And it is also true that The Pennsylvania Company had a title company of its own called Colonial Title Company.

Q. What became of that company?

A. That company is still going and is getting more and more business. It has been ever since. (Tr. 80.)

Q. You did not mention that a minute ago. Do they have a complete title plant?

A. They don't have a complete title plant. They are one of the five or six, I would have to count them up to get the exact number, not over seven companies, that make use of the title plant of the Commonwealth Title Company of Philadelphia. They are, so to speak, affiliates of that company. They take their own applications; and the policies, however, which are issued, are the policies of the Commonwealth Title Company of Philadelphia.

Q. What is the name of that company you mentioned?
A. Colonial.
Q. Colonial?
A. Yes, sir.
Q. That is owned by the Philadelphia Company?
A. No. It is not owned by—I don't know who owns its stock; although I judge it is owned by the Pennsylvania Company.
[fol. 96] Q. It has no plant, but just an insurer, that is what that is?
A. It gets the applications. It holds the settlement. As to the division of fees in connection with the insurance, I am not well informed. If you desire further information about that I know Mr. Robins will know about that. (Tr. 81.)
Q. It would be your definition of a non-plant company, wouldn't it?
A. No, because it is a company that has the benefit of a plant, and has an equal benefit of that plant with all the other corporations which own between them the stock of that plant company.
Q. Who owns the Commonwealth?
A. Do you mean the Commonwealth Title Company of Philadelphia?
Q. Yes.
A. There are about six or seven different trust companies who are entitled to—called title companies—perhaps one or two of them are separate title companies—that are the owners of the stock, as I understand it, of the Commonwealth Title Company of Philadelphia.

Mr. Ewing: Only give facts if you know them.
The Witness: I am telling them as I understand them. I can't vouch with exactness, but I know how the business is done; that they do their business, title business, through the Commonwealth Title Company of Philadelphia, which not only has the plant but issues the settlement certificates.

By Mr. Gibson:

Q. Commonwealth Title Company?
[fol. 97] A. Commonwealth Title Company of Philadelphia. (Tr. 82.)

Q. After the merger, Mr. Mecutchen, how many complete title plants existed in the City of Philadelphia on November 1st, 1927?

A. Are you speaking now of plants as operating plants?

Q. Yes, as operating plants.

A. There was our own plant.

Q. What plant is that?

A. That is the plant formerly used by the Real Estate Title Insurance and Trust Company. There was the plant of the Title Company of Philadelphia. There was the plant of the Commonwealth Title Insurance and Trust Company. And there was the plant of the Kensington Title and Trust Company.

Q. You have just stated that the Kensington was not a complete plant.

A. I don't think it was nearly as complete; but not nearly as old.

The Court: Not nearly as complete as the other company.

By Mr. Gibson:

Q. The Title Company of Philadelphia, was that a complete plant?

A. Not nearly so complete in some respects as the Commonwealth Title Insurance and Trust Company plant, the Real Estate Title plant or the Land Title and Trust Company's plant, so far as the period to which they carry back their deeds.

Q. As I get your answer, the two outstanding plants in the City of Philadelphia after the merger were The Real Estate-Land Title and Trust Company and the Commonwealth Title Company, is that true? Commonwealth Title Insurance Company.

[fol. 98] A. So far as the period to which the records were carried back, I think that is true. I do want to say that the plant of the Title Insurance Company of Philadelphia was a first-class type of modern plant which was economical to keep up and which was a good working plant.

Q. Of those two outstanding——

A. Complete enough for that purpose.

Q. Of the two outstanding plants in the City of Philadelphia, mergered, who got the bulk of the business?

Mr. Ewing: If you know.

The Witness: Now, do you mean of just those two, the Commonwealth Title and Trust Company and the Land Title and Trust Company?

By Mr. Gibson:

Q. Did the bulk of the business go to those two?

A. I can't answer that question. When you say the bulk of the business you probably mean the majority.

Q. That is it. (Tr. 83-84.)

A. And if you mean that, I can't say whether our company and the Commonwealth Title Company, Title Insurance and Trust Company, got more than all the rest put together.

Q. We are talking about the plant end of it. The bulk of the business to title plants went to those two companies, did it or did it not?

A. I can't answer that because I do know that the constituent companies that then existed of the Title Company of Philadelphia were all active and good concerns, and I don't know what the total of their business was. But it was [fol. 99] not as great then as it was later, after the merger with the Commonwealth Title Insurance and Trust Company, which afterwards was formed into the Provident Title and Trust Company. And after that plant was acquired by the Title Company of Philadelphia, and the Provident Title Company taking the place of the Commonwealth Title Insurance and Trust Company, became one of thet constituent parts of that group of title companies.

Q. All this you have been referring to in your last statement occurred sometime in 1929 or 1930, didn't it?

A. I don't know the exact date.

Q. It was after the merger of 1927?

A. Oh, yes, it was; that is right. (Tr. 85.)

Q. Isn't it true, Mr. Mecutchen, prior to this merger the two complete title insurance companies that went into this merger were the foremost title plants in the City of Philadelphia?

A. I think they were generally looked upon as about the two best.

Q. Don't you think it was?

A. Do I think they were?

Q. Yes, sir.

Mr. Ewing: I object to what he thinks.

The Court: Well, I could imagine what his answer is going to be.

Mr. Gibson: He ought to know, your Honor. He had lots of experience with those companies.

The Court: If you ask him which one, I think I know what he is going to answer.

[fol. 100] The Witness: I think they were.

The Court: If it is objected to, it is an opinion, I will have to sustain the objection.

Mr. Gibson: I am willing to accept his answer as generally as it refers to the question.

The Court: All right.

By Mr. Gibson:

Q. Mr. Mecutchen, you stated that all the records of the Land Title and Trust Company are now stored in the basement of one of the buildings in the city, 517 Chestnut Street. Those records are available and they are intact?

A. I think so, as of the date they were stored. (Tr. 86.)

Q. The information contained in those records on October 31st, 1927, is still there, is it not?

A. That is correct, sir.

Q. There have been no subtractions or eliminations therefrom, have there?

A. Not that I know of, sir.

Q. The expense of operating the Land Title and Trust Company plant in 1913 was the same in proportion to the records as it was in '27, was it not?

A. I would think about proportionately, yes, sir.

Q. The only addition would be the addition of volume of records?

A. Yes. They did not have as many employees then, I am sure.

Q. The size of Philadelphia in 1913 was much smaller than it is now?

A. I really can't answer that.

[fol. 101] Q. You can't answer that?

A. No.

Q. The volume of business was not as great, insofar as title searching went, in 1913?

A. I would think that was true then with the building that went on after that time.

Q. In 1913 there was still a few farms within the limits of Philadelphia?

A. Yes, I think that is correct. (Tr. 86-87.)

The Court: There still are.

Mr. Gibson: Not as many.

By Mr. Gibson:

Q. When was the greatest growth in the City of Philadelphia, during the war period?

A. Not during the war period, I shouldn't think so.

Q. Following the war?

A. Following the war, for a number of years.

Q. Up till about what time?

A. Well, I would guess somewhere around 1924 or '25, or somewhere around there.

Mr. Ewing: If you know.

The Witness: That is only my guess.

Mr. Ewing: Well, don't guess.

Mr. Gibson: I believe that is all. I might add another question later on, not today.

[fol. 102] Redirect examination.

By Mr. Ewing:

Q. Mr. Mecutchen, Mr. Gibson asked if the state of the title plant of the Land Title Company stored at 517 Chestnut Street basement is the same today as it was at the time it was stored there, and you said yes, I believe. Has anything been done to keep it up to date since it was stored there?

A. Absolutely not.

Q. Have any entries been made in it at all since it was stored there?

A. I do not believe so.

Q. Well, you know that.

A. I am sure that there weren't.

Recross-examination.

By Mr. Gibson:

Q. Not since what date?

A. I believe not since the early part of October.

Q. 19——

A. 1927. (Tr. 88-89.)

[fol. 103] Wednesday, February 3, 1937, Second Day

Henry R. Robins, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ewing:

I am president of the Commonwealth Title Company of Philadelphia and have been since May 1, 1929. The corporation was formed in April, 1929, and I was its first president. Previously I was vice-president of the Commonwealth Title Insurance Company for almost two years. Prior to that, I was president of the Peoples Bank and Trust Company. The Peoples Bank & Trust Company did title insurance business but did not have a title plant. They examined titles with a staff of clerks, and bought title searches from other companies, but did not insure through another company. Prior to that I was vice-president of the Land Title and Trust Company, from 1918 to 1922; and, prior to 1918, was vice-president of the Real Estate Title Insurance Company, which position I occupied from 1913 until 1918. I have been in the title insurance business since 1892, first with the old Equitable Trust Company, until 1897, and then went as a clerk to the old Commonwealth Title Insurance Company. In 1901 I went as clerk with the Land Title and Trust Company and was with them until 1913. I advanced from clerk to assistant title officer, and then title officer, and was in the title department during [fol. 104] the whole time. I was familiar with the title plant operated by the Land Title, and knew it from beginning to end and back again. I have been in the title insurance business continually since 1892. (Tr. 91-93.)

I was in Court yesterday and heard Mr. Mecutchen describe the Land Title plant, and my description of that plant would coincide with his. There were one or two little things that in describing that mass of material Mr. Mecutchen, I think, overlooked one thing particularly, what we call the name index. He described the taking off with the Manila slips from the City Hall, and I think they were typewritten on permanent paper. The typewritten slips were marked according to locality by section, block, and group, and there filed away entirely by locality, disregarding the names of the parties and the place of record in the

City Hall, such as filing was concerned. The take-off Manila slips were arranged in the same order in which the books appear in the Recorder of Deeds' Office and were bound up and given the same letters designating the volume and pages that appeared in the Recorder of Deeds' Office.

It was essential that they should be kept that way on account of this name index. There are many deeds and other papers that go on record that have no description on that paper—on them, such as assignments for the benefit of creditors, conveyance of a mortgage, of interest in a decedent's estate, without describing the properties.

Now, there is no place in this locality file in which those slips could be filed. An index is kept of those deeds that have no description in them, called the name index, and the [fol. 105] names of the parties. And when a deed is discovered on that index, according to the book and page, in book T. G., and so on, the only place to find what that deed contained would be to look at T. G., the locality index. These slips which were bound up according to the Recorder of Deeds' Office were kept that way in order that reference may be made to them, and they never became obsolete.

In the testimony yesterday it was confusing to a person who did not understand. The question was asked whether or not those take-off Manila slips did not become obsolete and dead when the period provided by the statute of limitations expired. Now, Mr. Mecutchen answered the question correctly. In referring to those Manila slips he said, as far as judgment records are concerned, after the period expired the records became dead. But the judgment index take-off is not on those Manila slips at all. It is an entirely different office that furnishes that information, coming on long pages every day, the list of judgments. And those were the entries that he meant became dead.

These yellow Manila slips with the deeds and records of the Recorder of Deeds never become dead because they may have to be referred to all the way back. They are a permanent part of the title plant and have to be used. The applications are not a part of the plant at all. The applications refer to the title insurance business of the Company. (Tr. 94-95.)

Now, you have two distinct departments; one, the plant which is the record of all the records in the City Hall kept up from day to day; judgments, deeds, releases, mechanic

liens, mortgages. And the title department is run entirely independent of that. The examination of the titles is made [fol. 106] in a different department. What the plant department does is to furnish to the title department merely the records of the deeds and mortgages and other instruments which appear against a particular property, the title of which is being insured by the title department. They furnish that information on what was called, as Mr. Mecutchen said, a T. D. title department search. With that search they send in the slips for that particular lot. When the title department has examined the title, issued the certificate, and it is all ready to go to the applicant, the slips are sent back to the plant and filed back again, and the title department then carries through the rest of the business. When we refer to the title plant, we have no reference to anything in the application file. We have, on several occasions, valued title plants. I was called in with Mr. Clark, of the Delaware County Trust Company, to examine what were called three plants up at Reading, together with their title department records. We found that they were not what we call plants. One of them was a partial plant, and we valued that with the title records—two of them were partial plants, such as we have here in Philadelphia, and the other one was merely the records of their title insurance department.

I also was called in, with the same Mr. Clark, to value and appraise the title plant of the Lancaster First Title Insurance Company of Lancaster. That was a title plant such as we know it, not completely backed but a great number of years back, back to 1890, and it was kept up the way we keep our plants up. (Tr. 96-97.)

With Mr. Mecutchen I was invited to value the title plant of the West Jersey Title Company in Camden. We went over. That was a title plant. And we valued the title [fol. 107] plant, together with the title insurance records, separately, and then gave a total valuation for the two together.

With Mr. Bonsall I was invited to appraise and value the plant of the old Commonwealth Insurance and Trust Company, and we did that. I can't say definitely at whose request I made these various appraisals, but the purposes for which they were done—the one over in Camden, the Insurance Commissioner asked that two persons come outside of the interests there, preferably from Philadelphia, to value

the plant. The president of the company suggested Mr. Mecutchen and myself, and we were approved by the Insurance Commissioner of New Jersey as appraisers. We reported our appraisal to the president [of the company], and it was forwarded to the Insurance Commissioner of New Jersey. I was informed that it was accepted, by the Insurance Commissioner and that the value we put on it was allowed to be put on their statement. The purpose of the appraisal of the Lancaster Title Company was at the request of Mr. Peter Cameron, who was then the Banking Commissioner of Pennsylvania, for the purpose of asset value in examining that. We made the report to him, but I don't know what he did with it. I didn't follow that up. The three companies up at Reading we appraised at the request of the officers of those three companies, because they had in contemplation a combination of those companies somewhat similar to the one we have in the present Commonwealth Title Insurance Company. There was another one I forgot to mention. Mr. Mecutchen and I were asked to value the plant of the Merion Title and Trust Company. We were asked indirectly by the Insurance Commissioner, [fol. 108] who was not satisfied with the figure at which they were carrying it on their books. We found out that it was not what you would call a title plant. It is a collection of records, very few of which are plotted and located as a title plant such as we know it. But the bulk of it was merely a lot of title insurance applications and records of the basic titles and things like that. When I speak of Mr. Mecutchen, I mean the gentleman who testified here yesterday. Mr. Mecutchen and I together valued the assets of the title department of the Merion Title and Trust Company at the request of the Secretary of Banking of Pennsylvania, and together we valued the title plant of the title insurance company in Camden; and I valued other plants at Lancaster and Reading. I was familiar with all the component parts and various aspects of the title plant of the Land Title and Trust Company in 1913, and I feel confident that I can place a value on the plant as of that time. (Tr. 97-100.)

Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st, 1913?

Mr. Gibson: The witness has stated that he is familiar with the plant, but he has not said in what way, what he knows about the equipment.

Mr. Ewing: You can cross-examine him if you want to.

Mr. Gibson: He is your witness.

Mr. Ewing: I feel he is qualified. I asked him if he is thoroughly familiar with all the parts of the plant. He said yes. I have no objection if Mr. Gibson wants to cross-examine him.

[fol. 109] The Court: Mr. Gibson, would you like to cross-examine him further as to his qualifications upon that question before I rule on it?

Mr. Gibson: I don't believe I will cross-examine him.

The Court: Do you wish to record an objection?

Mr. Gibson: Yes, your Honor.

The Court: Note the objection, Mr. Stenographer. And I think the witness is qualified, and I will permit the witness to answer. And will you note an exception. Proceed.

The Witness: May I ask you to repeat the question.

(The following was read by the Reporter "Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st 1913?")

The Witness: March 1st, 1913, I would say I am of the opinion that the title plant of the Land Title and Trust Company was worth one million and a quarter dollars.

By Mr. Ewing:

Q. Were you familiar with the plant from then on up until October 31st, 1928?

A. Only in a general way, because I was no longer with the Land Title after 1913. But I presume that it was kept up until the close in the same way it had been kept up before. I think Mr. Mecutchen testified before that it had been. (Tr. 100-101.)

Q. Mr. Mecutchen testified yesterday that it had been kept [fol. 110] up until about the time of the merger in 1927. What I am asking you now is the plant as it was on October 31, 1928, after it had been stored down at 517 Chestnut Street and abandoned by the company.

A. Well, after it was abandoned by the company, it is an entirely different thing than it was before it was abandoned by the company.

Q. Then I am asking you if you are familiar with the condition in which it was at that time after it had been abandoned and stored in the vault.

A. Yes. I haven't actually been in the vault down there, but I know——

Q. You were here in court yesterday and heard Mr. Mecutchen testify as to what disposition had been made of the plant?

A. I was. I heard it.

Q. You heard him testify that it had not been kept up after the latter part of October, 1927, and that during the latter part of October, 1927, and the early part of November, the records had been moved down and stored in the basement of the building at 517 Chestnut Street, and that nothing further had been done with them as far as using them as a title plant was concerned. You heard all of that testimony?

A. I heard all of that. With that testimony I would not think the plant was worth much.

The Court: I did not get that.

The Witness: I would not think the plant was worth much now, or when it was stored there in 1928, at the end of the year.

[fol. 111] By Mr. Ewing:

Q. I am asking you now, under the conditions which you heard testified to yesterday by Mr. Mecutchen, what, in your opinion, was the fair value of that plant as it was a year after the merger in October 31, 1928?

A. It was worth just about what you could get for it. I would not believe you could have gotten over $100,000 at the outside.

Q. Then, in your opinion, the outside fair value of the plant on October 31, 1928, would be $100,000?

A. About $100,000. Somewhere between fifty and a hundred. You couldn't find a purchaser for that.

Mr. Gibson: I object to that answer, your Honor.

The Court: Yes.

Mr. Ewing: It is too late.

The Court: I sustain that objection.

Mr. Gibson: I move it be stricken.

The Court: He said he couldn't find a purchaser for it. You did have one inquiry. (Tr. 102-103.)

The Witness: Your Honor——

The Court: That consisted of only one inquiry after the merger. And the asking price on it of $1,000,000.

The Witness: That was in the early part of 1928. I am testifying as to October, 1928, which is a good deal different, [fol. 112] your Honor. After that plant had been allowed to lie there for over a half a year——

By Mr. Ewing:

Q. Let me ask you to say what the difference was in the plant after it had been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928?

Mr. Gibson: I object to that question. He said he was not personally familiar with the plant, never been down to examine it; the only way he could judge was from the testimony he heard here yesterday.

Mr. Ewing: I have a right to ask him, based on the testimony of Mr. Mecutchen, which was unimpeached.

The Court: He said he hadn't actually seen the plant since 1913, but he presumes it had been kept up to date, up to 1927 (Tr. 104.)

He said he heard Mr. Mecutchen say it has been kept up to date. And by reason of his familiarity with the plant, and the profession in general, I think he could answer the question.

Mr. Gibson: Exception.

The Court: To protect the Government, we will note an objection and an exception is allowed.

By Mr. Ewing:

Q. Will you answer that question?

A. I thought I did answer it.

[fol. 113] The Court: Better read the question.

By Mr. Ewing:

Q. I asked you what——

The Court: I think he answered the question completely.

The Witness: There was an objection raised and the Judge stopped me.

The Court: Will you read it again to the witness?

(The following was read by the Reporter: "Q. Let me ask you to say what the difference was in the plant after it had

been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928?") (Tr. 105.)

The Witness: It would have a continuous depreciation from October 31, 1927, down to 1928; that depreciation rapidly increasing as time went on. In the early part of 1928 the depreciation of the value of that plant would not be so great as at the end of the year, and as you got near the end of the year it would go down at a greater rate. So it would be pretty nearly valueless at the end of the year, for the expense of bringing it up to date would have been so great that no one would have thought—no sane man in business would have thought of buying that plant and going to the expense of bringing it up to date.

By Mr. Ewing:

Q. That is a year after it had been stored?
[fol. 114] A. A year after it had been stored. In the early part of the year the expense of bringing it up to date would not have been so great.

Q. What other elements do you take at fixing the value as of October 31, 1928, beside the cost of bringing the plant up to date?

A. The question of marketability.

Q. How would that be affected?

A. Why, greatly. Any asset of any kind which is discarded, allowed to deteriorate, and then attempted to be sold as a second-hand used article, depreciates in value; and the title plant does, in the same way, the same as the ordinary. (Tr. 106.)

Q. How many different title plants have you had experience with?

A. The Land Title and Trust Company, the Real Estate Title Insurance and Trust Company, and the Commonwealth Title Insurance and Trust Company, and the present plant of the Commonwealth Title Company of Philadelphia, which is a combination of the old Commonwealth Title Insurance Company plant and the Title Company of Philadelphia plants.

Q. The present company of which you are president is a merger and consolidation of two other companies?

A. Yes. It is a consolidation. It wasn't actually what we know as a legal merger, but it was a consolidation of the

business of two companies running a title business, each of which had a separate plant.

Q. Then you have been through the same situation that Mr. Smith testified yesterday he went through?

A. Exactly.

Q. And was your experience the same as his in connection with these title plants at the time the arrangement was [fol. 115] worked out? Did you know what you were going to do with the two title plants?

A. No, not until we got together.

Mr. Gibson: It seems to me that question is awfully remote. He is talking about he heard another man testify to the same experience.

Mr. Ewing: I thought your Honor would be interested in knowing he went through the same experience. (Tr. 107.)

The Court: I don't mind telling you, Mr. Gibson, that was going through my mind, and I was wondering what that answer would be before that question was asked. I will say this, that I think your question is improper, if objected to, and if you object to it I will sustain your objection. But as a matter of curiosity, probably not so much as a judge as a lawyer, I was wondering what the situation was. If you interpose an objection I will sustain it.

Mr. Gibson: I object to it.

The Court: I will sustain the objection.

By Mr. Ewing:

Q. When you gave your values of the Land Title and Trust Company title plant on March 1, 1913, and on October 31, 1928, did you take into consideration at all the applications of that company in connection with the title insurance?

A. No part of the plant had anything to do with it. I was asked to value the plant.

[fol. 116] Mr. Ewing: Cross examine.

Cross-examination.

By Mr. Gibson:

Q. Mr. Robins, you say you had occasion to value a number of title insurance plants. You made a valuation of the Provident Title plant?

A. That is the old Commonwealth Title Insurance and

Q. The old Commonwealth?

A. Yes, sir; together with Mr. Bonsall.

Q. How did that plant compare with the Land Title plant of which you made a valuation also?

A. For result of operation and utility, they were practically the same.

Q. Practically the same?

A. The title plant at the Land Title was much more complete.

Q. Much more complete?

A. Yes, as a matter of record.

Q. Complete or convenient?

A. Complete.

Q. Yes.

A. It was, in fact, the only really complete plant in the City of Philadelphia.

Q. What would be the next complete plant?

A. The Real Estate Title Insurance Company.

Q. In other words, the two plants, as a result of the merger, were the two most complete plants in the City?

A. Yes. (Tr. 109.)

Q. It is true that the Land Title had unlocated mortgages. [fol. 117] It had all that the Real Estate didn't have?

A. The Real Estate had them too, but the two systems were entirely different, both in construction and operation.

Q. But they were both excellent plants?

A. Yes. You could get the same result from each of them.

Q. You could get the same result from each of them. In making your valuation of the Commonwealth, did you value the applications as part of the plant?

A. I think that valuation would include the applications for the purpose for which it was made. I was asked to include them and I did.

Q. You included that and called it a part of the title plant?

A. Yes.

Q. But really in truth and in fact the applications are no part of the title plant?

A. They are no part of the title plant.

Q. No part whatever. In arriving at your valuation you placed a certain value on each application, an arbitrary value of a certain amount, after giving deductions?

A. That is right.

Q. Did you consider that a proper way of valuing these applications?

A. Yes. I wouldn't have done it otherwise.

Q. That was two dollars an application?

A. I don't remember what it was. (Tr. 110.)

Q. Well, if you made that valuation of two dollars, that was correct?

A. Yes.

Q. And in arriving at your valuation you multiplied the [fol. 118] number of applications by the two-dollar figure?

A. Well, I haven't got it here. I suppose I did, if you have it in front of you.

Q. In order to refresh your memory, Mr. Robins, I hand you a photostatic copy, and I will ask you to state what that it.

A. That is the valuation and appraisal which Mr. Edward H. Bonsall and myself placed upon the title plant and applications of the old Commonwealth Title Insurance and Trust Company as of March the 1st, 1913.

Q. And of that total valuation you allocate a value to applications of $256,150?

A. Right.

Q. Giving a total valuation of the plant of $779,221.74?

A. Those are the figures.

Q. You say that the applications are no part of a title plant?

A. They are not.

Q. If you take the valuations from that, what does it leave the figure on the valuation you placed on the Commonwealth?

A. $523,000. (Tr. 111.)

Q. $523,000. For the purpose of the record, I want to read your definition of the plant. If you will read that.

Mr. Ewing: I object to that. I think it is like getting in values of other properties in condemnation proceedings. He is going into, now, reports rendered in the valuation of another title plant and figures on that. In the first place, it is not comparable.

[fol. 119] The Court: Are you testing his capacity as an expert?

Mr. Gibson: We expect to bring it very shortly another valuation that this gentleman made relative to the plant which is now in dispute, and we want a comparison with the two valuations.

The Court: For the time being, I will admit that, Mr. Ewing, and see what develops, in view of Mr. Gibson's statement that that might be relevant. If that is not justified, I will ask you to renew your objection later on. I will give you an exception.

Mr. Gibson: Just read it.

The Witness: I think I will read the preliminary because it is "pursuant to your request".

Mr. Gibson: All right. (Tr. 112.)

The Witness: "Pursuant to your request, the undersigned have surveyed and appraised the 'Title Plant' (hereinafter called Plant), formerly belonging to the Commonwealth Title Insurance Company (now Provident Title Company) as it existed on March 1st, 1913." Now, that request was to value the plant of——

Mr. Gibson: I am not asking you to answer that.

Mr. Ewing: I think he ought to have a chance to explain.

The Court: Yes, because I think it is a basis of it.

[fol. 120] The Witness: That request was to value the title plant including the applications as part of it.

"The Title Plant consisted of two parts, viz:—

1. Abstracts of the public records of Philadelphia County, including deeds, mortgages, Sheriff's deeds, assignments, releases, etc., all indexed, plotted and located on plans of the City as subdivided into sections and blocks.

2. Separate abstracts of title, searches and opinions in each matter for which the company issued the title insurance policy, or obligation of such nature."

By Mr. Gibson:

Q. In your letter you made that statement, that the title plant consisted of——

A. In accordance with the request the title plant that they asked us to value. (Tr. 113.)

Q. Mr. Robins, after this merger in 1927, how many complete title plants, title insurance plants, were there in the City of Philadelphia?

A. There only has been one complete title plant in Philadelphia, and that was the Land Title plant.

Q. That was the Land Title?

A. Yes. That is the only plant that was ever complete.

Q. In October, 1929, did you, in response to a request from Mr. Johnson, the vice president of the Real Estate-

Land Title and Trust Company, make a valuation of his plant?

A. I don't remember the date. In the latter part of 1929, at the request of Mr. Johnson, I was asked to give him what, in my opinion, was the value of their title plant on March 1, 1913.

[fol. 121] Q. The Land Title and Trust Company.

A. Yes, the Land Title and Trust Company.

Q. Do you recall what conclusion you reached there?

A. The total valuation, which, in my opinion, the plant was worth, was $1,250,000.

By the Court:

Q. Did that include the applications?

A. No, sir.

By Mr. Gibson:

Q. You say that did not include the applications?

A. It did not. (Tr. 114.)

Q. That was the reproduction cost of construction?

A. Oh, no. Reconstruction cost is only one of the elements I took into consideration.

Q. What do you say about the good-will of that plant?

A. It had very valuable good-will.

Q. Very valuable?

A. It certainly did.

The Court: May I ask you in what sense you use the term good-will of a plant of that kind? I am not captious at all. But what do you mean by good-will of a thing; not a living concern or a going concern, but a plant? What do you mean by good-will?

Mr. Gibson: I mean, your Honor, the ability to—it is past experience and reputation in the community in which it serves, and ability to draw business.

The Court: Good reputation, wouldn't that be more accurate, the reputation of that plant?

[fol. 122] Mr. Gibson: No, I think it relates to the ability of the plant to draw profit, to draw business which results in profit. I would like to have the record show that the witness agreed with me on that.

The Witness: Do you want me to describe what I consider the good-will of a plant?

Mr. Gibson: Yes. (Tr. 115.)

The Witness: The fact that this was the only complete title plant having everything that is recorded in the City of Philadelphia indexed on its books was known throughout the profession, the legal profession and the real estate men and the large lenders of money, many of whom felt and brought their business to the Land Title by reason of that fact, feeling that they had greater protection. That was well advertised, and it was a source of good-will in bringing the business to the company for that reason.

By Mr. Gibson:

Q. That fact alone meant a great deal to any corporation owning the Land Title and Trust Company, whether it was active or inactive, is that true?

A. I don't understand the purport of that question.

Mr. Ewing: It means whether you were using the plant or not, I suppose.

By Mr. Gibson:

Q. The ownership of the Land Title and Trust Company by The Real Estate-Land Title and Trust Company, this [fol. 123] plaintiff, meant a great deal of prestige to the company, did it not?

A. If it was known that they were using that plant it would have meant a great deal of prestige to them.

Q. Whether they were using it or not?

A. Not if they weren't using it. Then it was known they were using it, throughout the whole profession. (Tr. 116.)

Q. You heard the testimony yesterday, they were still using those applications.

A. I am talking of the plant not the applications.

Q. So, according to your answer, Mr. Robins, when they ceased to operate this plant, upon the purchase and abandonment, as it has been testified, and the opening for business under the name of The Real Estate-Land Title and Trust Company, this prestige was lost, good-will was lost?

A. Prestige based on the operation and use of that old Land Title Company's plant was gone.

Q. It was gone?

A. Yes.

Q. Complete loss immediately?

A. Yes—no, it wasn't a complete loss, because it was substituted with the plant at the Real Estate Title, which also had good-will, prestige.

Q. Did you mean that the Land Title and Trust Company's prestige was absolutely lost when they purchased the plant, and took it and put it down the cellar? Is that your answer?

A. The plant of the Land Title and Trust Company as a good-will asset of The Real Estate-Land Title and Trust Company ended when they discarded that plant.

Q. It ended?

[fol. 124] A. The good-will value of that plant did. (Tr. 117.)

Q. And it was lost?

A. And it was lost.

Q. And you testified, I believe, that the information contained in that plant became absolutely valueless, is that true? Is that what you mean to testify?

A. Valueless to The Real Estate-Land Title and Trust Company.

Q. Because they had the same information as the other plant?

A. They had the same information prepared in a different way and on a different system. In other words, they could get the same result. I don't say they had the same information, but they could get the same results from the Real Estate Title Insurance Company plant as they could have gotten from the old Land Title Company plant, possibly in the very early days, referring to the records in City Hall.

Q. In other words, you mean it would have been useless for the new corporation, this plaintiff, to keep two records which contained the same information?

A. The same information, because they would have to—to have kept up two separate systems.

Q. Yes.

A. Because they were built and constructed of entirely different systems, and they were operated and maintained on entirely different systems. (Tr. 118.)

Q. The information which would have been contained at both of those plants, as kept up to date, was taken off by largely the same people?

[fol. 125] A. It was taken off by the same people, but it was plotted by the people on its own.

Q. But the information covered in the same period would have been the same?

A. The information would have been the same, yes. It was exactly the same. It must be.

Q. Do you want to tell this Court that when this property was placed in the basement in October, 1927, and abandoned by the Land Title and Trust Company, it became absolutely worthless?

A. At the end of the year.

Q. At the end of what year?

A. The year after the merger.

Q. The year after the merger?

A. It may have had salvage value of $100,000 or something like that.

Q. You have had experience in building title plants, haven't you?

A. Yes, sir. (Tr. 119.)

Q. Do you want to tell the Court that it would have been cheaper for you to build a complete title plant a year after the abandonment of the Land Title and Trust Company plant rather than to have taken the Land Title and Trust Company plant as abandoned and bring that information down to date?

A. Because no one now would build a complete plant. To run the title business in Philadelphia it is not necessary to build a complete plant such as the Land Title and Trust Company had.

Q. Mr. Robins, you didn't answer my question. It would be perfectly all right for you to explain but I would like to have an answer to that question.

A. Repeat the question, will you, please?

(The following was read by the Reporter:

"Q. Do you want to tell the Court that it would have [fol. 126] been cheaper for you to build a complete title plant a year after the abandonment of the Land Title and Trust Company plant rather than to have taken the Land Title and Trust Company plant as abandoned and bring that information down to date?")

The Witness: No, it would not have been cheaper to build a complete plant like the Land Title's. It would have been cheaper to have brought it down to date.

By Mr. Gibson:

Q. It would have been cheaper than build any plant under those conditions?

A. Yes. (Tr. 120.)

Q. Any workable plant?

A. Yes.

Q. In other words, you said it might have $100,000 valuation. According to the valuation of the plant on March 1, 1913, it would have taken more than $1,000,000 to either bring that plant down to date or build a new plant?

A. It would not have taken a million dollars to build a new plant, but it would have taken more, a good deal more than a million dollars to build a new plant such as the Land Title and Trust Company had; it would have taken at least a couple of million dollars.

By the Court:

Q. Is it of record why it would be necessary for a new company to be formed today to build a plant and run it like the Land Title?

A. The modern way of doing things is by photostat. And you could photostat enough of the records to cut down the expense tremendously—from taking off by hand every deed, [fol. 127] and so forth, that there is on record. And it can be done much cheaper in the modern way, and can be located on a different system, which is much cheaper than the system which was adopted by the Land Title and Trust Company.

Q. Are you operating under that system now? Is The Real Estate, the plaintiff here, operating under that modern system today?

A. That they will have to answer, your Honor. (Tr. 121.)

The Court: All right, we will get that.

Mr. Ewing: Just for your information, they are not photostating.

The Court: They are using?

Mr. Ewing: No.

The Witness: I am not talking about the present daily take-off, understand. We are doing that. What I am talking about is building up a plant. You can build up a plant by photostating the old records, and a great many of them today, much cheaper than you could take them off by hand, as was done by the Land Title and Trust Company in 1885 or six, whenever it was that they took them off.

The Court: That does not quite cover Mr. Gibson's question. It may be I did not get the full import of your an-

swer. Mr. Gibson asked you, as I understood it, whether [fol. 128] you thought it would be cheaper to build and construct an entirely new plant or bring the plant of the Land Title Company, which ceased to be operated after October, 1927, down to date.

The Witness: It would have been cheaper to bring that one down to date than it would to build a new plant.

Mr. Gibson: That was the question.

The Witness: Yes.

By Mr. Gibson:

Q. But still you say it was valueless. You say that it was valueless at the end of the year?

A. Yes.

Mr. Ewing: No, he did not say valueless.

The Witness: No, I said it had a salvage value.

The Court: $100,000.

The Witness: Of a hundred thousand dollars.

Mr. Ewing: That still means something to me.

The Court: Now we have come to that question of obsolescence. We have just been told now about this method of photostating. And I was wondering if the present method rendered the former method that was in use in 1927 obsolete.

By the Court:

Q. Do you still resort to the same methods of tracing down titles as you did ten, fifteen or twenty years ago, or [fol. 129] is there something new?

A. No, we trace down titles the same way.

Q. And you get an abstract?

A. We get an abstract in the same way. But when you speak of values, both Mr. Gibson and you seem to be entirely confusing yourselves to the reproduction cost. There is a market value and marketability in this thing that enters into it more largely than reproduction. (Tr. 122-123.)

Q. Those records go back 150 years probably. If you did not have the Land Title Company plant in existence and you had to construct a new plant wouldn't there be a lot of time occupied searching those records, finding out what had to be photostated? You don't know what to photostat until you look at all those records.

A. A title man knows what to photostat. When we built the title plant for the Title Company of Philadelphia in

'24 and '25, we knew exactly what we had to photostat. And where we saved a lot of money on our plant, we have a photostat from the Bureau of Survey of Philadelphia, not by hand as The Real Estate-Land Title was done—every block drawn out. I think there was a saving of expense and time there.

By Mr. Gibson:

Q. Have you ever sold any plants?
A. No.
Q. Have you had any occasion to have anything to do with the sale of any plant?
A. The sale in this consolidation we had was practically a sale from one company to another.
Q. What consolidation are you speaking of?
A. The consolidation between the old Commonwealth Title Insurance and Trust Company and the Title Company [fol. 130] of Philadelphia, resulting in the company of which I am now the president. (Tr. 124.)
Q. That was on the basis of the exchange of stock for stock?
A. No. The two plants were given a value, and stock was issued for them to the stockholders of the old company.
Q. Non-taxable reorganization?
A. I don't know whether it was taxable or non-taxable.
Q. The stockholders were given stock in proportion to their old holdings, is that the way it was handled?
A. No, we formed a new corporation entirely called the Commonwealth Title Company of Philadelphia. And to that company the old Commonwealth Title Insurance Company, now the Provident Title Company, sold all its title paraphernalia, including the title plant. The Title Company of Philadelphia did the same thing.
Q. There was no cash transaction in the sale?
A. Cash passed. The Title Company of Philadelphia got all cash. They went out of business. We paid them off.
Q. How much did you pay for the plant?

Mr. Ewing: I object to that.
The Court: Objection sustained.

By Mr. Gibson:

Q. This valuation of the Land Title and Trust Company that you made for The Real Estate is based on a reproduction. That is the way it was valued, reproduction value?

A. That was one of the elements. (Tr. 125.)

[fol. 131] Q. One of the elements?

A. One of the elements.

Q. You took the number of books that were examined and the money spent for salaries and such as that, did you not?

A. Yes. I think that came around—somewhere around $1,000,000.

Q. Actual expenditures?

A. Yes, as near as they could be estimated.

Q. According to the statement a minute ago relative to rebuilding a modern plant then, it would not take that much, a million dollars, now, to reproduce this plant?

A. Not the way the plant would be reproduced by any sane title man. Now, to reproduce the plant of the Land Title and Trust Company it would cost over $2,000,000.

Q. Are you speaking of March 1, 1913 value, reproduction value?

A. Reproduction value. The reproduction value at that time probably would be somewhere around $1,000,000.

Q. Somewhere around $1,000,000?

A. Yes.

Q. Even then that would have included a lot of stuff that would not be practical now to include in a plant or was not practical then?

A. Practical then. It had to be gotten off if they were going to have a plant of that character. Mr. Gibson, all these title plants are constructed on entirely different lines, all five of them.

Q. All five of them?

A. And once you start on maintaining them along those lines, they are not comparable with the other at all. The [fol. 132] only thing comparable about it is the result you can get from them.

Q. You get the same result?

A. You get the same result, but from an entirely different construction, entirely different manner of operating. Two houses built entirely differently and run entirely differently. They both serve as homes. One may cost $10,000 a year to keep and the other only two thousand.

Q. Then according to your answer, your opinion, the market value would depend on the result you could get from the plant, not in the reproduction value?

A. The market value depends on that, as well as the construction value, the good-will value and the economy of oper-

ation as well; and the law of supply and demand is the biggest feature on the whole than on market value.

Q. The law of supply and demand, didn't that have a great deal to do with the value of this consolidation? Didn't that increase the valuation of the Real Estate Title and Trust Company's holdings by reducing competition? (Tr. 127.)

A. When I say the law of supply and demand, I mean the law of supply and demand before the purchase of the title plant.

Q. Will you answer my question, please.

A. Would the law of supply and demand have anything to do—what was the question?

Mr. Gibson: Read the question.

(The following was read by the Reporter: "Q. The law of supply and demand, didn't that have a great deal to do with the value of this consolidation? Didn't that increase [fol. 133] the valuation of the Real Estate Title and Trust Company's holdings by reducing competition?")

The Witness: I don't know. I am not a student in economics.

By Mr. Gibson:

Q. Well, as a man of common experience and a man who has had a great deal of experience in the title business, wouldn't it be common sense that the competition in the City of Philadelphia would be reduced by the combination and merger of two of the foremost plants in the city? Please answer that question yes or no.

A. No, it would not.

Q. It would not?

A. No. (Tr. 128.)

Q. Why would it not?

A. The title business isn't run that way. The competition in title business isn't on that basis at all.

Q. Well, why? Why isn't it on that basis?

A. The dealings with the public of the title companies are uniform, substantially uniform with everybody.

Q. Mr. Robins, you have just testified that these applications contained a great deal or a good deal of value. You agreed with my definition of good deal, didn't you?

A. If you let me finish my answer.

Q. Let me ask you this question: When The Real Estate-Land Title and Trust Company acquired the title plant of the Land Title Company, which included approximately 146,000 applications, along with the title plant, do you want [fol. 134] to tell this Court that it did not increase the good-will or the prestige or have anything to do with the acquisition of new business?

A. I don't think it would have increased the new business, taking the business of the Land Title and the Real Estate Title—had done together—and to get a total—I don't think the combination would have increased the business over that total. I can't answer for I don't know the figure, but I would say that it did not.

Q. It would have increased the business over what The Real Estate-Land Title and Trust Company had before under normal conditions, wouldn't it? (Tr. 129.)

A. Are you talking about the increase of the business of the two companies combined, increasing more than the total or of the——

Mr. Ewing: Let him answer.

The Witness: Say the Land——

Mr. Gibson: He is not answering my question.

The Witness: Yes, I did.

Mr. Gibson: Read the question, please.

Mr. Ewing: Give him a chance. Your Honor please, he is cutting him off.

The Court: I don't think Mr. Robins quite understands your question there. He wants to know whether you mean the merger would do more business than the two separate [fol. 135] entities did before or whether the two separate entities acting separately would do less business than the merger.

Mr. Gibson: No.

The Court: Let Mr. Robins explain.

The Witness: The Land Title Company—we will just use figures—say had 12,000 applications a year, and The Real Estate-Land Title had eight, that makes 20,000.

Mr. Ewing: You mean Real Estate Title.

The Witness: I mean Real Estate Title had eight, making a total of twenty. And I don't think the combination would have increased the combined business of twenty. (Tr. 130.)

By Mr. Gibson:

Q. It would maintain the combined average, wouldn't it?

A. I should think so. I don't know. I haven't the figures. But I think it would have run about that.

Q. You should think it would have run about that?

A. Yes, I should think so. I don't know. I don't know what the result was because I am not connected with the company. That can be ascertained by referring to the books of the company itself.

Q. Is it your opinion that the Land Title and Trust Company had a substantial good-will value?

A. The plant of the Land Title and Trust Company had a substantial good-will value both on March 1st, 1913 and on October 31st, 1927.

[fol. 136] Q. Mr. Robins, in your valuation of the Land Title and Trust Company, do you recall whether you placed values on the applications?

A. I don't remember ever having placed any value on the Land Title and Trust Company's applications. I don't recollect ever having done so.

Q. You included $640,000, in round numbers, expenditures from '86 to '13. If any part of those expenditures related to applications and the title department, that should have been deducted from your reproduction value of the plant? (Tr. 131.)

A. From the reproduction value, yes. Unless the whole thing was wiped out it wouldn't have made any difference in my conclusion in the end because the same reproduction value is only one element.

Q. The same valuation of two dollars per application would apply on the valuation that you would place on their insurance plant as it did in the Commonwealth?

A. I don't know how I made that up. I wouldn't want to answer that. I think it probably would. I am not sure. I wasn't asked to value the applications of the Land Title. And it would only be guesswork now to say they were worth the same as the Commonwealth's.

Q. Mr. Robins, with regard to the plant fees, strictly the plant fees.

A. The plant what?

Q. The plant fees, the title searches and such as that.

surance plant that they can earn a reasonable return on investment?

A. I don't think that you realize, when you say plant fees, [fol. 137] how the thing was run, because there was no——

Q. That is what you told the Judge, for title searches.

A. Let me explain. The plant does not make charges except for searches, not title insurance searches which they are asked to furnish. (Tr. 132.)

Q. We know that, Mr. Robins. And that is what I am asking you.

A. Those fees they charge for searches, as a by-product of the plant are very small.

Q. A by-product of what plant?

A. They are just a by-product of the plant. In other words, one of the title companies that has got a plant, who says, "You give him a search of all mortgages and liens there are against the property," that search is made by the plant department for a small fee, very little over cost.

Q. Very little over cost?

A. There was no revenue of any speaking from the plant itself, except what the title department allotted out of its fees for every application for which the plant furnished it with the search. And they, I believe, did allot a certain figure to the plant for bookkeeping purposes.

Q. Outside or non-owning title company?

A. There was a regular schedule of prices for the sale of these searches to the non-plant companies and the public. The cost of a search, certifying all the liens and mortgages and judgments which were asked for was twenty-two dollars at that time; and that is about what it cost to get it out.

Q. Then the same fees were allocated between the plant owning title companies and non-plant owning companies to the title plant? (Tr. 133.)

[fol. 138] A. No. The non-owning title company had nothing to do with the title plant. In the Land Title and Trust Company they came and asked to give a search of all liens against them. The plant furnished that search. The application made to the Land Title for insurance title. The Title department went to the plant and said, "Give us a search in the way of liens against the property." The plant furnished that to the title department.

Q. The same fee was charged to the outsider as was allocated?

A. No. I am quite sure it wasn't. They just took some arbitrary figure for the search furnished by the plant to the title department for bookkeeping purposes. It was not fair to charge all the expense on the plant when the title department was getting the benefit of it.

Q. Is that the way this matter was handled in the Commonwealth?

A. You mean this present Commonwealth Company?

Q. Yes.

A. No, because we only have one line of business, title insurance.

Q. Only one line of business?

A. That is all. We keep all ours in one account. We don't do anything except title insurance business.

Q. The non-title owning companies who came to a title plant for a search did not split their insurance fees with the title plant, did they?

A. No, they came and they bought a search from the plant the same as you and I would go and buy a search and pay twenty-two dollars.

[fol. 139] Mr. Gibson: That is all.

The Witness: You say that is all?

Mr. Ewing: Are you finished?

Mr. Gibson: Yes. (Tr. 134-135.)

Redirect examination.

By Mr. Ewing:

I was with the Land Title and Trust Company from 1918 to 1922 as vice-president, and the title department was under my supervision from 1918 to 1922. I was intimate with the title plant until 1922. I knew it back and front. After I moved from there, in 1922, I still had contact with the title department and had many business matters with it, and my intimacy with the plant continued.

Q. Now, I would just like to clear up one other matter. Mr. Gibson asked you quite a few questions on reproduction value and you stated that reproduction value was one of the elements in your valuation of this title plant. Now, what were the other elements so that we can get it all straight?

A. There is reproduction value. There is good-will value. There is economy of operation value. And the law of supply and demand.

Q. Well now, what effect, as far as the value of the plant is concerned, taking it out of use and storing it down in the basement, would it have on the plant?

[fol. 140] A. It would deteriorate most rapidly. (Tr. 135-136.)

Q. You testified it would deteriorate from not being kept up. Would that have any other effect on possible purchasers of the plant?

A. It certainly would. Possibly a purchaser of anything in the way of a second-hand article is going to figure, as Mr. Mecutchen brought out, what it is going to cost to bring it up. It is a second-hand article. He can go and buy a cheaper new article of a modern make that will answer his purpose just as well, and he is not going to buy a second-hand article that he has got to spend money on, if he can buy something else that answers his purpose, cheaper, and is not anything as good.

Q. And was it known the reason this was discarded for The Real Estate-Land Title plant was on account of its high cost of operation?

A. Yes. Throughout all title circles of Philadelphia where there was a possible market for this plant everyone knew that the Land Title's plant had been discarded and the Real Estate Title plant was the one that was going to be used.

Q. And they knew the reason for it?

A. Every title company in town knew it, and every company in town knew the reason why, on account of the expensive mode of operation. It was discussed at title meetings; representatives of title companies talked it over. (Tr. 137.)

Recross-examination.

By Mr. Gibson:

Q. Will you tell the Court what, in your opinion, was the good-will value of the Land Title and Trust Company plant?

[fol. 141] A. I couldn't put good-will value in dollars and cents, Mr. Gibson.

Q. You couldn't do that?
A. No.
Q. It was substantial, was it?
A. Very substantial.
Q. Very substantial?
A. Very substantial. (Tr. 138-139.)

J. Willison Smith, recalled by the court.

Direct examination.

By the Court:

Q. Mr. Smith, yesterday you told us how many employees were operating the plant of the Land Title Company at the time of the merger. Was it 113?

(Here attorney for plaintiff states that Mr. Mecutchen is the witness who answered the question of the Court, and that he would be recalled. The Court further stated:)

The Court: There are three things I want to know, gentlemen. I want to know how many men were operating the old Land Title, how many men were operating the plant at the time of the merger, and how many are operating the plant now.

Mr. Ewing: The first two are on the record. I will put them on again, if you want. I didn't put it down on my memorandum. It is on the record.

124 were operating the Land Title plant immediately before the merger.

[fol. 142] The Court: Now, wait. Land Title before the merger, 124.

Mr. Ewing: Yes, sir. And 43 at the Real Estate Title.

The Court: How many under the combined?

Mr. Ewing: Mr. Mecutchen, just take the stand. (Tr. 139-140.)

Pierce Mecutchen, recalled.

Direct examination.

I testified yesterday that immediately before the merger the Land Title and Trust Company title plant took 124

people to operate it and at the same time the Real Estate Title Insurance and Trust Company's plant was operated by 43 people.

By Mr. Ewing:

Q. How many people operated the Old Real Estate Title Insurance and Trust Company's plant which is now used by the new merged corporation?
A. At the present time there are 28 such employees.

By the Court:

Q. 28?
A. Yes.

By Mr. Ewing:

Q. So that the actual operation of that has been reduced since the merger.

[fol. 143] The Court: 167 to 28.

By the Court:

Q. Is that right?
A. Well, from the time of the merger—at the time of the merger the Real Estate Title plant, which is the one that we are now using, employed 43 employees. (Tr. 140-141.)
Q. At the time?
A. At the time of the merger. At the present time there are 28 now employed on that work.

By Mr. Ewing:

Q. And the other plant of course was discontinued and stored in the cellar?
A. And practically all of those, and a very large part, if not all of the old employees of the title plant of the Land Title, had to be laid off.

By the Court:

Q. See if I got this right. This is quite important. There were 124 employees under the old Land Title?
A. That is right.
Q. There were 43 under the old Real Estate Title?

A. That is right.
Q. Making a total of 167.
A. Yes, sir.
Q. Now the merged companies in the title plant employ 28?
A. At the present time the merged company employs 28.
Q. Is that because of the lack of business or is it because of the efficiency brought about by the merger?
A. I should say that the difference between the 43 that were necessary to operate the old Real Estate Title plant [fol. 144] in 1927, and the 28 that are now employed in that same work, has been due to the cutdown in the force continually during the depression. And while business is coming back quite rapidly, the force has not been expanded—has been expanded but very little during the last year in which business has been coming back. And eventually there will have to be some expansion there to take care of the expanding business.

By Mr. Ewing:

Q. That expansion will only be up to the 43 though?
A. 43 was, I should say, probably the maximum number with the old Real Estate Title plant. And I think it is very unlikely that we will go beyond that figure.

By the Court:

Q. Even with the volume of business being equal to the combined business of the two in 1927?
A. The combined business of the two, after the merger, during the year following the merger was considerably less in that year than had been done by the two companies operating during the year preceding.

By Mr. Ewing:

Q. What percentage less?
A. I think I have the figures, or perhaps they were not handed to me. But my recollection is—and I can make definite of that—there was a difference of about 10,000 applications. (Tr. 142-143).

By the Court:

Q. Mr. Mecutchen, after the merger in 1927, will you tell me how many employees were in the plant then, that year?

A. I am sorry, sir, that I haven't that available. I only [fol. 145] know that the best of our employees in the Land Title plant were kept along with those that were deemed to be the best in the Real Estate Title.

Q. Would there be over 43?

A. That I can't answer. I am pretty sure Mr. Zehner will know about that. During the year following the merger, I can't answer that. (Tr. 143-144.)

Cross-examination.

By Mr. Gibson:

Q. There was, Mr. Mecutchen, a substantial economy in operation due to this merger, wasn't there?

A. Substantial economy of operation in discarding the Land Title plant for the Real Estate Title plant.

Q. What about the state of the real estate business in 1927, '28? That was the year before the depression.. What about the real estate business in Philadelphia?

A. I am sorry I can't answer that question with any real accuracy. It may have been falling off slightly, but it certainly was quiet at the time of the depression, I mean at the time of the merger.

Q. Did it go down after the merger?

A. It may have gone down some during that year, but I really don't know. But, at any rate, there was no great slump during that year at all.

Q. Mr. Mecutchen, this number of operating men in the plant that includes the complete plant, the insurance and searches?

A. No, sir, it does not.

Q. It does not?

A. It includes those that were engaged entirely in the [fol. 146] plant, and does not include the title clerks and examiners and title officers, what are known as the employees of the title department as such.

Redirect examination.

By Mr. Ewing:

Q. Title plant and title department are two distinct things?

A. We always spoke of them as such. Of course we do know that the plant served the purpose of the title department, but it is considered as a separate entity.

Q. When you are speaking of the title plant, you are speaking only of the records which you talked about and the people that were employed to keep up those records?

A. Keep up those records and get out the searches that were necessary in the plant. (Tr. 144-145.)

Q. The number of people employed to keep up those plants would not depend on the number of applications for title?

A. No.

Q. Wouldn't there be a fixed number necessary to do the amount of work to run that title plant and keep those records up to date?

A. I think that the number of 124 that was taken off from our books indicates the people who were engaged in the plant, both those who were performing the work of keeping up the plant directly by dealing with the abstracts and locating them and having everything kept up to date, and also a certain number of clerks that were called search clerks [fol. 147] who got out the searches both for the outside and for the title department.

Q. The 43 men who kept the Real Estate Title plant up did the same work for the Real Estate Title Company that the 124 did for the Land Title?

A. Exactly the same work.

Q. So that when you abandoned the Land Title plant and took over the Real Estate Title plant you could carry on the new plant with 43 men, instead of 124 men?

A. Yes, sir. I can't say positively as to exactly what the force was immediately following.

Q. But that is the reason you abandoned the Land Title plant and took over the Real Estate Title plant? (Tr. 146.)

A. Undoubtedly. I am only saying that there were certain valuable and expert clerks, mostly the search clerks who did this work for the title department, that I speak about, in our Land Title plant, that were not laid off immediately and were kept on in the other plant. I think they kept more at the start than they absolutely needed.

Q. Because they didn't want to put the men out of jobs?

A. Because they would put them out of jobs.

Q. They were gradually laid off as other opportunities were offered to them?

A. That is true.

Q. Now, Mr. Mecutchen, Mr. Robins testified this morning that you valued other insurance plants with him on different occasions.

A. Two, in fact.

Q. One of them over in Camden, for the Insurance Commissioner of New Jersey, and the other one at the Lower [fol. 148] Merion Title and Trust, out at Ardmore, for the Secretary of Banking of Pennsylvania.

A. That is correct.

Q. You were familiar, of course, in your testimony yesterday, with the plant of the Land Title and Trust Company, where you were working on March 1st, 1913?

A. Yes. (Tr. 147.)

Q. What, in your opinion, was the fair value of that title plant at that time?

A. I think it was worth, in my opinion, a million dollars.

Q. And you were equally familiar with the plant on October 31, 1928, a year after the merger? What in your opinion—your answer to that is yes?

A. Yes, that is true.

Q. What, in your opinion, was the fair value of the plant at that time?

A. Not over a hundred to $125,000.

Mr. Gibson: May I get the last question and answer, please.

Mr. Ewing: The question was, fair value of the plant on October 31, 1928; and the answer was not over one hundred to one hundred and twenty-five thousand dollars.

Recross-examination.

By Mr. Gibson:.

Q. What do you base your answer to that question on, Mr. Mecutchen?

A. As to both valuations? As to the period of March, 1913, I know that we were doing very good business at that [fol. 149] time; that the plant had a good reputation. And if we had been going to sell out our title plant, I am quite sure that it would not be sold for less than that figure. I also understand——

Q. What was that figure? (Tr. 148.)

A. A million dollars.

Q. A million dollars?

A. I also understand that it is a part of the facts agreed in this case that it would have—that some $600,000 represented the actual cost of building up that plant.

Q. No, that isn't true, Mr. Mecutchen.

A. I thought that was.

Mr. Ewing: No, the value isn't to be based upon any facts agreed in this case. Your value is to be based upon what the facts are, according to you.

The Witness: I understand that the costs up to that time were $600,000. And being the cost of building up that could be allocated to the building up and maintenance of that plant. And both from the cost value and the fact that it would have cost considerably more to have built that plant at the time, in 1913, spoken of, on those two factors, and on the good reputation that our company had, and its plant at that time, I believe that it would have brought a million dollars had there been any company that wanted to start in business, in the title business, at that time. (Tr. 149.)

By Mr. Gibson:

Q. You think it cost more to reproduce the plant than to build it down?

A. I think it did. At the time, in 1913, I am sure that the [fol. 150] cost of material and costs of work, wages, would have been higher than they were in the years when that was built up and constructed.

Mr. Gibson: That is all.

Mr. Ewing. That is all. We rest.

Mr. Gibson: Just one question I want to ask Mr. Mecutchen.

By Mr. Gibson:

Q. Mr. Mecutchen, you have a record of the number of instruments which were recorded in the City of Philadelphia during the year 1927 and '28, the fiscal years of '27 and '28, have you not?

A. You mean that we could get out such a record as that?

Q. You have that in your plant, haven't you?

A. I think we could calculate them. We could get them up, but we haven't them actually made up, as far as I know.

Q. But you got them?

A. For 1927, the whole year 1927.

Q. 1927?
A. And the year 1928.
Q. and '28?
A. All the instruments, all the take-offs.
Q. Yes, the number.
A. Including judgments as well?
Q. Yes, sir.
A. All the take-offs from City Hall? (Tr. 150.)
Q. Yes, sir.
A. I have here the take-off from November 1st, 1927 to October 31, 1928, if you would like to know what that was at the time.
[fol. 151] Q. Have you the take-off for '27?
A. Not up to October—to November 1st, 1927, I haven't.
Q. You got it for that. Then we will have them for both.
A. Would you like to have it for the year from November 1st, 1926 to November 1st, 1927?
Q. I don't want it unless we got—yes.
A. I mean as compared with the year from November 1st, '27, to November 1st, 1928.
Q. Yes.

Mr. Ewing: I would like to have you give those while you are there.

By Mr. Gibson:

Q. Would that record, to some extent, or a great extent, show the activities of the real estate market in the City of Philadelphia during those years?
A. Well, so far as liens were concerned, it would indicate a falling off. I mean the more liens there were the more likely——
Q. I am asking you the activities.

By the Court:

Q. You mean tax liens? (Tr. 151.)
A. Yes. They do take off income tax liens, if that is what your Honor means. But the number of deeds and mortgages would indicate quite a little as to the activity of the market. I think that is true.

Mr. Gibson: You got that for the two years.
Mr. Ewing: Give it to him from October 31, 1927 to October 31, 1928.

The Witness: From November 1st, 1927 to October 31st, [fol. 152] 1928, inclusive, there were 54,419 mortgages; 62,710 deeds; 19,963 assignments; 2,031 releases; 38,207 judgments; 47,075 liens, including more particularly mechanics and municipal claims; and United States District Court judgments, 1,944; and bankruptcies, 1,149.

By Mr. Ewing:

Q. Were any of those items entered in the records of the old Land Title Company plant?

A. None of those take-offs were entered during that period.

Q. Have they ever been entered?

A. No.

Q. And would that all necessarily have been entered if the plant was to be kept up and kept useful?

A. It would have been a necessary part of the plant to have made all those entries in that Land Title plant if it was to be kept up. (Tr. 152.)

Q. On October 31, 1928, the year after the merger, that title plant down at 517 Chestnut Street was lacking all these entries for that year?

A. Yes. Those entries totalling altogether 227,498.

Mr. Ewing: That is all.

By Mr. Gibson:

Q. Mr. Mecutchen, now, you have in your plant now and you did have at the end of 1928 the information which you have just given us as it was taken from the public records.

A. We had that information in the way of abstracts from the public records, that is correct.

Q. And that was entered in the plant of The Real Estate-Land Title and Trust Company?

[fol. 153] A. Yes, The Real Estate Title and Trust Company plant.

Q. And for the purpose of bringing the plant to date, which you did not keep to date, during the year now in question, it would have been an easy matter, with that information in your office, to do it?

A. I don't think it would.

Q. Why?

A. Not to have assembled all that plant and put it in a position—supposing there had been room for it down there.

Q. We are not talking about where you had your plant.

Mr. Ewing: Let him answer. (Tr. 153.)

The Witness: I am satisfied it has got to be put in a situation where it is workable and entries made and the work necessary in that connection.

Mr. Ewing: Let him answer.

The Witness: And it could not possibly have been done unless there had been found—unless it could have been spread out in the way it was in its original situation in the Land Title Company, and that would have meant to have done it, to comply with that system, and to bring that plant down to date, according to that system—that there would have been by employing again the larger part, if not all, the old Land Title force occupied at the plant.

By Mr. Gibson:

Q. All right, Mr. Mecutchen, you answered the question [fol. 154] the way you wanted. Now I want to ask you a question. Other things being equal, and you had all the space in the world you needed to set out the Land Title and Trust Company like it was before you started, with that information in your possession, would not it have been a very easy matter to have put that on the books of the Land Title and Trust Company much easier than if you had had to go to the public records and take it off?

A. I believe it would have been easier to do it than if you had to go to the public records and take all those abstracts off, to begin with.

Q. In other words, it would have been much cheaper? (Tr. 154.)

A. It would have been cheaper for us to have done that than for some other company to do it.

Q. There is no question that it would have been cheaper.

Mr. Ewing: I object to his cutting in.

Mr. Gibson: This is cross-examination. The witness is trying to qualify every answer.

The Witness: I am trying to explain something that is a technical matter. I am trying to tell the truth.

The Court: Gentlemen, you are a little impetuous. Let Mr.——

Mr. Ewing: Mecutchen.

The Court: Finish his answer before either one of you interpose. There is a great temptation to interpose. Finish

[fol. 155] The Witness: I think I have finished it.

Mr. Gibson: Now, I want to ask you one more question, Mr. Mecutchen.

By Mr. Gibson:

Q. Would not it have been a foolish act for a corporation which owned two complete title plants and had no use for one to have kept them both up to date?

A. I think that is correct.

Q. That is correct, isn't it? All these records of the take-off which you have for your old Land Title plant, which is now in use, or Real Estate Title Insurance plant, are now in your files? (Tr. 155.)

A. That is correct.

Q. In chronological order as they were taken off?

A. They are there located properly in our plant that we are now using.

Q. Now, Mr. Mecutchen, one other question. I am sure we won't have any argument about it. I wish you would tell the Court—I believe the Court asked you yesterday about the basement that these records are stored in. First, I want you to say whether or not the place is easily accessible, whether the records there stored are in such position that they are not subject to water leakage and such as that?

A. I don't think there is any depreciation or deterioration as a result of any dampness or anything of that kind, so far as I know. I have been down there. And while it is dark and is below the surface of the ground, there does not seem to me to be anything that has caused deterioration from that status.

[fol. 156] By the Court:

Q. Is heat on?

A. Yes.

By Mr. Gibson:

Q. Plenty of light?

A. There can be electric light turned on at any time. (Tr. 156.)

By Mr. Ewing:

Q. What is the floor space, Mr. Mecutchen, where the

A. The floor space was looked over. I have had so many memoranda that it is a little bit hard to get the particular one. The floor space, as examined, shows that there is some 208 square feet occupied by some of the Land Title plant records on the second floor.

Q. How many square feet?

A. 208.

Q. On the second floor?

A. On the second floor.

Q. Down in the basement I mean.

A. That is apart from the basement. Down in the basement the total square feet in the entire basement——

Q. No, I just want to know the amount occupied by these records, Mr. Mecutchen.

A. Occupied by the plant records in the basement, 1,617 square feet.

Q. And how high is that basement?

A. The basement is, I judge about 10 feet high. And, at all events, the height of the files and the various book places, all those records, extend to about 9 feet from the floor, making about 14,553 cubic feet of space that are occupied by those records in the basement. (Tr. 157.)

[fol. 157] Q. All right, that is all on that. I will ask you another question. Have you a record there of the number of applications of each, of the Land Title and Trust Company and the Real Estate Title and Trust Company, received in the year prior to the merger; and then the number of applications the year following the merger, received by the merged company?

A. I have here a memorandum showing that the Land Title had for the year ending October 31, 1927—it says "based on a ten months' total"—11,688 applications.

Q. How many in the same period did the Real Estate Title have?

A. The Real Estate Title, for the same period, had 20,857 applications.

Q. Making a total between those two of how much?

A. 32,545.

Q. During the first year of the new or merged corporation, what was the total number of applications?

A. For the fiscal year ending October 31, 1928, 22,254 applications.

Q. Making a drop of the new corporation, from the total of the other two, of somewhere in the neighborhood of thirty per cent?

A. Yes, sir; a drop of a little over 10,000 applications.

Mr. Ewing: That is all.

By Mr. Gibson:

Q. What was that last period, Mr. Mecutchen?

A. The last period was for the fiscal year ending October 31, 1928, which would have been for the entire year from [fol. 158] November 1st, 1927 down to October 31st, 1928.

Mr. Ewing: That is all.

Henry R. Robins, recalled.

Direct examination.

By Mr. Ewing:

Q. You testified as to the value of the title plant of the old Land Title and Trust Company as of March 1st, 1913, and as of October 31, 1928. Now, what, in your opinion, is a fair value of the plant at the date of the merger, October 31, 1927?

A. The value on March 1st, 1913 it would probably be more, positively not less.

Q. And the value on March 1st, 1913, was a million and a quarter?

A. A million and a quarter.

Mr. Ewing: That is all. (Tr. 158-159.)

Plaintiff rests.

Defendant's Evidence

Afternoon Session

Here follows supplemental agreed statement of facts which was read into the Record (Tr. 170-174) and inserted immediately following the original stipulation of facts and [fol. 159] listing of exhibits hereto, pp. 1-11.

Offers in Evidence

At this point in the trial there was offered in evidence by Mr. Donahoe, one of the attorneys for the defendant, defendant's Exhibit 1, consisting of nine sheets, being the annual operating statements of the Land Title and Trust Company for the fiscal years ending September 30, 1921, to September 30, 1927, and a statement of the same kind for the month of October 1927; the month immediately preceding the merger—the last sheet being a summary of the other statements. The entry was marked in evidence as said defendant's exhibit, and this exhibit number one is incorporated herein by reference and made a part of this bill of exceptions. Defendant's exhibit number two, a record of the Land Title applications, that is, the applications of the Land Title, and one of the consolidated companies, for all the years from 1885 to October 31, 1927, and the number of applications in January and February of 1913, being respectively 770 applications in January and 731 applications in February. This exhibit, defendant's exhibit number two, is incorporated herein by reference and made a part of this bill of exceptions. Defendant's exhibit number three, being the number of applications that the Real Estate Title Insurance and Trust Company had for the years 1876 to October 31, 1927, with an accompanying sketch, a second sheet, which shows the number of applications of the merged companies, that is, The Real Estate Land Title and Trust Company, for the years—November 1927 to the end of the year—and for the years 1927 to 1933, including the first eleven months of the last year. This exhibit, defendant's exhibit number three, is incorporated herein by reference and made a part of this bill of exceptions. (Tr. 174-176.)

[fol. 160] Mr. Ewing: I would like to ask the purpose of the offers of these last papers. I don't know the relevancy of them.

Mr. Donahoe: They will show something as to the relative activity of the Real Estate Title and Trust Company, or the Land Title and Trust Company, the 1913 volume of their business, and the volume in 1927 when the merger took place. It will also show the general growth of the business. And it will also show something in regard to the effect or the amount of the business which was retained

after the consolidation by the merged company as compared with the business of both companies before the date of the consolidation.

Mr. Ewing: It is already in evidence, the number of applications which the two companies separately received the year before the merger, and the number of applications received by the new or merged company the year following the merger.

The Court: Well, the Government has certain reasoning and certain deductions to be made upon the presentation of those facts and I suppose that will be developed in the argument. And for the purpose of doing that, we will have it on the record, so that he may refer to it, and the Court will have the information and can follow the argument. The Government has a theory and it is in support of that theory. Whether the theory is tenable or not, that is a different proposition. Suppose it is tenable, it would be well to rebut [fol. 161] this by actual figures. If it is not tenable, everything will be by the boards.

If you want to interpose an objection, I will permit the objection and I will give you an exception.

Mr. Ewing:

I think not knowing what it will be used for in the future, I would like to note an exception.

The Court:

All right.

Mr. Donahoe:

I want to reserve the right to substitute copies.

The Court:

There is no objection to that.

Mr. Ewing:

No, sir.

The Court:

Anything further, gentlemen? (Tr. 176-177.)

Mortimer N. Eastburn, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Donahoe:

I reside at Harris and Froebel Roads, Chestnut Hill, Philadelphia, and have a place of business at Kensington and Allegheny Avenue, Philadelphia. I am an attorney-at-law. My experience in the building, operating, and selling of title insurance or title search plants in the City of Philadelphia is as follows:

[fol. 162] I first became connected with the title insurance business in the year 1906, when I was employed as a title clerk for the Real Estate Title Insurance and Trust Company. I remained with them until the year 1910, when I went with the Kensington Trust Company, Kensington and Allegheny Avenue, Philadelphia, as title officer. I remained with them, as title officer, until 1929, when they disposed of their plant. At that time I became their trust officer; and I remained with them in that capacity until July 1934, when I resigned to engage in the practice of the law. A plant (title) was built under my supervision for the Kensington Trust Company, beginning about the year 1924, until 1929, when it was in such a completed condition that it was used for the purpose of title insurance and searches. I was the man in charge and supervised the building of that plant. Sometime later I negotiated a combination of nine companies, who formed a new company called the Pennsylvania Title Insurance Company, to whom the plant was sold by the Kensington Trust Company in the year 1929. (Tr. 178-179.)

Q. Were you familiar with the market or the potential buyers, or do you know who they might have been in Philadelphia in October of 1927?

A. In October of 1927 and about that time the Kensington Trust Company had this plant; and in 1927 the title business was decreasing. It had started to decrease since the year, I would say, 1925. There were some little spurts in some years. It gradually decreased from 1925 on. The Kensington Trust Company had this plant on its hands, and business was decreasing, so it felt if it could sell the plant, or get some of the other title companies in the City to go along

[fol. 163] with it in the carrying of this plant, it would probably be better business for everybody. So I went out and talked to the officers of a great many different companies in the City of Philadelphia about the purchase of a plant. In that way I became more or less familiar as to what the conditions were in the City of Philadelphia as to the salability of a plant.

Q. What did you find as to that condition?

A. While most of the companies at that time were not large enough to purchase a plant of the size of the Land Title and Trust Company, there were at least two companies in the City who might have been interested in the purchase of that plant.

Q. Do you know what the plant which you constructed cost?

A. Yes.

Q. Do you know what it sold for?

A. The cost——

Q. I am not asking you for the cost.

A. It sold for three hundred——

Mr. Ewing:

I object. He was asked if he knew what it sold for. I did not anticipate he would give any figures.

The Witness:

I know what it cost and I know what it sold for. (Tr. 179-180.)

By Mr. Donahoe:

Q. Do you know what the situation was as to the fees charged for the services of the title plants as distinguished from the insurance fees, in 1913, March 1st?

A. In 1913, the fees——

Mr. Ewing:

Excuse me. My whom?

[fol. 164] Mr. Donahoe:

By plants generally in the City.

Mr. Ewing:

I don't think that is relevant.

The Court:

Let him be specific first, if you will, about his own company, and then see what he knows about the other companies.

By Mr. Donahoe:

Q. Were the fees charged generally in the City of Philadelphia for plant searches, for plant services, on a uniform basis in 1913?

A. They have been very nearly uniform ever since—from my experience in the business—ever since the year 1906.

Q. Do you know what they were generally in the City?

A. Yes, I do.

Q. Well, were those fees such as to permit the plant or plants in the City to earn a fair return on the cost of their construction?

A. You mean——

Mr. Ewing:

I object to that. That is too vague a question.

The Court:

That would depend upon the volume of the business.

Mr. Ewing:

Each particular concern. (Tr. 181.)

The Court:

Nothing is involved in that. If he did enough business——

Mr. Donahoe:

All right.

[fol. 165] The Court:

You might ask him about that year, the volume of business of that year his company did; whether or not it permitted him to conduct the *the* business at a profit. You can ask him that.

By Mr. Donahoe:

Q. Do you know whether title companies, plant owning title companies with whom you were associated, were mak-

ing any profit in 1913 on their business involving the plant services as distinguished from the insurance premiums?

Mr. Ewing:

That is objected to, sir. I don't want to get too far afield. We are only interested here, as I see it, in two questions. One is whether the plaintiff here has a right to take a loss on this title plant in 1928. The second is, if it had a right to take a loss, what is the amount of that loss?

Now, I think that that has only to do with the particular conditions at that plant, and I really don't think that going into the title business in the City of Philadelphia in general has any bearing on that question.

The Court:

I am going to admit the question, Mr. Ewing, just for the time being, to see what bearing it has on the question. Maybe a little later on—it won't possibly do any harm, and it might throw some light on the attitude of the Government. I would like to see what that is.

The Witness:

In the year 19——

Mr. Ewing:

May I note an objection and an exception?

[fol. 166] The Court:

Yes.

The Witness:

In the year 1913 the fees received for the plant, for the services, as such, were not sufficient to net it a fair return from the money invested in the maintenance and building of that plant, for the reason that the fees for plant services at that time were entirely too low; they averaged from sixteen to twenty-one dollars per matter.

By Mr. Donahoe:

Q. You were then with the Real Estate?

A. No, I was with the Kensington Trust Company in

Q. Do you know whether that was true regardless of the volume of business?

A. I would think that the fees were so low in the year 1913——

Mr. Ewing:

I object to what he thinks.

The Court:

Objection sustained. You find that a pretty hard question to answer, don't you? Irrespective of the volume of business that question was. (Tr. 182-183.)

The Witness:

Yes. Because the title company business is like water in a barrel. If you get the water up to a certain level, then you get your expenses and all above that is profit.

The Court:

That is the reason I want to call your attention to the fact that that question was predicated upon the fact that the volume of business wasn't being considered.

[fol. 167] The Witness: It would take a tremendous volume of business, considering the rates in 1913, for a plant as such, for its services, to earn a fair return on the investment.

By Mr. Donahoe:

Q. What considerations, in your opinion, would cover the determination of the fair market value of a title search plant in the City of Philadelphia at March 1st, 1913?

A. First, its replacement value; and second, its so-called good-will or the prestige, business prestige that it would give a company owning it. I wouldn't consider that its earning capacity would have anything to do with its market value, because I don't consider it had any practical earning capacity as such, considering the plant as such divorced from the title insurance business. (Tr. 184.)

Q. Have you an opinion as to the fair market value of a company title search plant in the City of Philadelphia as of March 1st, 1913?

Mr. Ewing: You are not asking him for figures.

Mr. Donahoe: No, I asked him if he had an opinion.

The Witness: I have an opinion as to the market value of a complete plant as of March 1st, 1913.

By Mr. Donahoe:

Q. What, in your opinion, would that value be?

Mr. Ewing: I object to that.

The Court: A complete plant. You might define what you mean by complete plant.

[fol. 168] By the Court:

Q. Would you call the Kensington Company a complete plant?

A. No, sir. The Kensington Trust Company's plant was never a complete plant.

Q. What do you mean by a complete plant?

A. By a complete plant I mean a plant which contains in practical usable form a reproduction of all the necessary records in City Hall for the search and examination of real estate titles.

Q. Could you give an opinion on that subject without looking at the plant? See how complete it was; see how efficient the records were kept; the whole set-up. Would you pass on a plant, let us say a complete plant, would be worth so much? Would you like to say you know the worth of the Land Title Company's plant in 1927?

A. No, sir.

Q. Without having looked at it?

A. No, sir. I would merely pass on what, in my judgment, was the value of a complete plant, not the Land Title Company's plant.

The Court: I sustain the objection and give you an exception.

Mr. Donahoe: If your Honor please, may I be heard on that? You passed on it. I wonder if I may be heard.

The Court: I will consider it withheld for a minute.

Mr. Donahoe: If you like to discuss the point with me. In view of the fact that the market would be controlled by what a complete plant was worth. That is, there is testimony [fol. 169] here that the Land Title plant was inefficient and expensive to operate. It was so in 1913 and in 1927.

Mr. Ewing: Not that it was inefficient.

Mr. Donahoe: Inefficient in respect to its earning power. It took three times as many men. (Tr. 184-186.)

The Court: The claim is it couldn't be operated as economically as the plant of the Real Estate Title Company.

Mr. Ewing: That is right.

The Court: Now, this gentleman has not made an inspection of the Land Title Company's plant. If you can show me that he has made an inspection of it around '27, or between '26 and 1927, and knows of its complete set-up, then he might be permitted to tell us what his opinion would be as to the value of it.

Your question does not bring about any analogy, no comparison between the plant in question and the imaginary plant that he may have in his mind. See the point?

Mr. Ewing: Your Honor please, it is almost like asking somebody how much a complete uniform cost.

The Court: You might say a house.

Mr. Ewing: Completely fitted up, fitted one way.

The Court: It might be a fine house, complete in all de- [fol. 170] tails. The one might be all right, as far as its essentials are concerned—kitchen, cellar, bath-room, and so forth—but you would have to have an inspection of the house in question. Can I ask this?

Mr. Donahoe: Certainly.

By the Court:

Q. You set up a plant of the Kensington Trust?

A. Yes. (Tr. 187.)

Q. I remember when you were starting that plant up at the Kensington Trust. Could you have used two plants economically, and of the same age and equipment practically?

A. No title company could use two plants.

Q. It could not use it economically. That is what I am trying to get at. There is certainly a point that is raised in my own mind. If you had two plants would you have considered it good economy either to dispose of one or abandon it?

A. We would either have abandoned or disposed of one of the plants. It would have been just a duplication of work and duplication of expense to maintain two plants with no useful purpose served.

Q. Now, in 1928 you said that you formed this merger of nine companies.

A. That is right.

Q. It took nine companies to merge in order to find one company of the size sufficient to warrant them buying your plant, is that correct?

A. That is correct. (Tr. 188.)

Q. Would that indicate to you that there was an open market for the plant of the size of the Land Title plant valued at a million dollars?

A. The reason I testify to that, Judge, is this: There [fol. 171] were two companies which we approached to join in our combination that were somewhat larger than any of the companies that did join in it, that wanted to purchase a larger interest in our set-up than we were willing to sell them. In fact, one company wanted to have a controlling interest in it and the other company wanted a very large interest in it. They were two companies which I believe might have possibly been interested in the purchase of a complete plant in the year 1927.

By Mr. Donahoe:

Q. Would you, as a title man, know in advance of the acquisition of two search plants by one party that only one of such plants would be used in the future business?

A. Absolutely.

Q. Was there any advantage accruing to owners of title search plants in 1927 from the limitation of the number of plants in the City of Philadelphia, the suppression or taking one plant out of the competition?

A. In all the years of my experience in the business, the companies in the City of Philadelphia were divided into two classes, known as, first, plant companies; second, as non-plant companies. The plant companies had involved a certain prestige in the business, in that the fact there were even some of the so-called old line trust companies in the City of Philadelphia that would not take the policy of any company that did not have a plant. And the advantage in 1927 of owning a plant, I would say, was predominantly on the prestige that the plant gave that company in its ability to get large business controlled by some large mortgage lenders. Therefore it would be of interest to the companies [fol. 172] owning and operating these plants to shut out competition among the so-called plant companies as much as possible and the suppression of one of the existing plants

in the City would be a financial benefit to the other companies owning plants at that time.

Q. Is there any essential diminution in the information or subject matter available in a title search plant as it stands on a given date through passage of time? I mean the material and the subject matter of the plant as it stands on a given date in the future.

A. You mean does the matter contained in the plant on a given date depreciate over the lapse of time?

Q. Yes.

A. Some small part of it does. For instance, records as to judgments and liens, some of which may become obsolete, as they might beyond the time in which they are legally liens. The great bulk of the material, such as deeds, mortgages, the plans do not depreciate. (Tr. 188-190.)

Q. If you had two plants, and had all the take-offs of the City Hall in your possession for a period subsequent to the failure to post in one plant, would it cost a great deal after the lapse of a year to bring a non-posted plant up to date?

Mr. Ewing: I object to that: He hasn't shown that he has ever brought a plant up to date after the lapse. It depends on the plant, the manner in which it is run, how the entries have to be made.

Mr. Donahoe: He has shown that he has built a plant. He has shown what he has operated. He has shown what work is involved in a posting plant. I think he is qualified to say [fol. 173] what it would cost to post it up to date.

Mr. Ewing: We have had two plants. It took 124 men to run one plant, 43 men to run the other plant. Think of the difference of cost in bringing those plants up to date if you had to pay 124 men to bring one of them up to date and 43 in the other plant.

The Court: Of course a lot would depend on the real estate conditions, activity, judgments, mechanic liens, deeds, mortgage foreclosures, wills. All those things would have to be taken into consideration to tell how much it would cost to bring a plant up to date. I don't see how he can do it. I don't see how he can tell us that. In fact, I want to tell you frankly if he gave an opinion I wouldn't take it. If Mr. Eastburn feels he is going to give it to you, I will let him give it to you. He is doing the best he can. I am going to admit it and give the plaintiff an exception.

By the Court:

Q. How do you feel about that question, Mr. Eastburn, yourself?

A. I can say this, that if a title company possessed two plants, one plant was down to date and the other plant was a year old, it would cost that company a lot less to bring the other plant down to date than it would cost a company who did not own the other complete plant, because of the fact they would have all the necessary information in the plant that was complete.

By Mr. Donahoe:

Q. Would it cost, Mr. Eastburn, more to build a plant on [fol. 174] a given date than the cost of its construction at an earlier date, and bring it up to date in the course of business during the passing of the years?

Mr. Ewing: That all depends on whether it means exactly the same kind of plant.

Mr. Donahoe: Same kind of plant exactly.

The Witness: I don't understand that question.

Mr. Donahoe: Will you read it, please? (Tr. 190-192.)

(The following was read by the Reporter: "Q. Would it cost, Mr. Eastburn, more to build a plant on a given date than the cost of its construction at an earlier date, and bring it up to date in the course of business during the passing of the years?")

Mr. Donahoe: That is, of a plant after construction down to date.

Mr. Ewing: It further depends on how much the people were being paid at the time the work was being done. The wage scale changes. It seems to me that is too general a question.

Mr. Donahoe: At March 1st, 1913—to overcome the objection.

The Court: Let us hear how Mr. Eastburn feels about it.

The Witness: It would cost less to construct a plant on a given date than it would cost to construct a plant at an [fol. 175] earlier date plus the cost to bring the earlier plant down to the given date.

By Mr. Donahoe:

Q. Why?

A. Because of the fact that during the interim when you were bringing the plant down to a given date you would take off so many instruments that would afterward become obsolete, such as judgments, liens, mortgages that would have to become satisfied, assignments of those same mortgages that would have to be satisfied, and then they would be of no use to you; and the releases of those mortgages.

Mr. Donahoe: That is all.

Cross-examination.

By Mr. Ewing:

Q. Mr. Eastburn, you testified you started building the Kensington title plant in 1924 and finished in 1929, is that correct?

A. Yes, sir.

Q. And that the title insurance business started to go down in 1925?

A. I would say so. The real estate business started to go down about '25 or '26 and continued downward until the collapse of all other business, the starting of the great depression.

Q. You kept on building this plant, spending money right along, from year to year, for five years, in the face of the title insurance business falling off all the time?

A. We had already started. We were committed to the idea and were compelled to go through with it. If several [fol. 176] years after we started we had not started I think we would have abandoned it.

Q. After the work started there was a dropping off in 1925. You kept right on building say until 1929, in the face of diminishing returns.

A. Because of the fact we had already started to build the plant. (Tr. 192-194.)

Q. What happened to it after it was completed?

A. It was sold to a combination of nine companies who formed the Pennsylvania Title Insurance Company.

Q. Did those companies contribute to the building of it?

A. They took stock. A new company was formed, the Pennsylvania Title Insurance Company.

Q. Before you started building it or afterward?

A. No, in the year 1929, after the negotiations were completed for the sale of the plant to this combination, the new company.

Q. It was just built as a promotion scheme to sell after it was started?

A. It was not a promotion scheme. It was the idea that these nine companies, their work would be facilitated by getting the information from a central plant which was to serve all of them. The Pennsylvania Title Company was to operate as a service company.

Q. I though- you said that those nine companies didn't start to have it built in 1924?

A. In 1924 those nine companies had nothing to do with it.

Q. They just bought it after it was completed in 1929?

A. That is correct.

Q. It was built then for the purpose of sale?

[fol. 177] A. No. In 1924 the business of the Kensington Trust Company alone was so large that it felt that it could build and alone operate a title plant. And the gradual decrease of business during the years when the trust company was building the plant then led it to believe that—to have this plant operated for the benefit of a group of companies rather than the Kensington alone, because in 1929 the Kensington didn't have business enough to carry the burden of a title plant.

Q. So that is the reason the Pennsylvania Title Company was formed and eight other companies taken in?

A. No, there were nine companies bought stock into the Pennsylvania Title Insurance Company, including the Kensington. Kensington was one of the nine.

Q. Did any of those nine have a title plant?

A. No.

Q. I understood you to say, in answer to a question, that if one company acquired two title plants it would be necessary to either scrap one of them or sell it?

A. Absolutely. Good business would dictate that. It wouldn't be financially possible. It wouldn't be reasonable to operate more than one plant.

Q. Do you know anything about the Commonwealth Title Company?

A. Nothing more than hearsay, general hearsay in the business. (Tr. 195-196.)

Q. Just about the same that you know of the Real Estate Title and the Land Title?

A. I worked for four years in the Real Estate Title plant and I am familiar with that plant. I don't know a thing [fol. 178] about the Land Title plant. I never saw it.

Q. You never saw it?

A. No, sir.

Q. You didn't know that the Commonwealth Title plant was made up of two other plants?

A. Yes, I did.

Q. You did?

A: Yes.

Q. I thought you said——

A. You mean the present Commonwealth Title plant?

Q. Yes.

A. Yes. I know that the present Commonwealth Title plant is made up of a combination of two plants.

Q. Then you didn't mean what you said in your direct examination, that if a company had two plants it would have to scrap or sell one of them?

A. I mean if they had two complete plants. The two plants that made up the present plant of the Commonwealth Title Company, as far as my information goes, were not complete plants.

Q. It is possible for a title company to take two plants and put them together under certain circumstances?

A. If they were complete plants it would be a serious financial mistake.

Mr. Ewing: That is all.

Redirect examination.

By Mr. Donahoe:

Q. Mr. Eastburn, might it be good business to retain and [fol. 179] even to abandon the use of a plant—to retain a duplicate plant in order to carry on or obtain the benefit of the good will, in your opinion?

Mr. Ewing: I object. He has covered this subject very well I think. I object to counsel trying to lead him to say something different.

The Court: That is out of the well.

Mr. Donahoe: What is that?

The Court: That is out of the well.

Mr. Donahoe: It was brought on by cross-examination.

The Court: In order to determine whether that would be good business policy you would have to know—sit around and know the information that would be around the directors' table to decide what was a good business policy. In a matter of that kind we certainly could not give snap judgment.

Mr. Donahoe: I want to ask Mr. Eastburn one more question on redirect examination.

By Mr. Donahoe:

Q. Mr. Eastburn, have you any knowledge of the volume of business available in the City of Philadelphia to title plants in 1913 as compared with the volume available in 1927, in the fall?

A. The real estate business in the City of Philadelphia before the great war was very, very small, than it was after the war. The volume of business from the year 1916 on was very much greater than it was in 1913.

[fol. 180] The Court: That was when we had a buy or move policy, and they bought, didn't they? I don't know whether that was true of Washington, gentlemen, but that was certainly true here.

Mr. Donahoe: That is all.

The Court: That is all, Mr. Eastburn. (Tr. 197-199.)

Defendant rests.

Testimony closed.

The foregoing agreed statements of facts, plus all the exhibits heretofore referred to in connection therewith and incorporated herein by reference, plus the aforesaid testimony and said offers of proof, constituted all the evidence submitted and offered by the parties at the hearing of this cause. (Here should follow, in the printed record, all of the exhibits introduced as part of the stipulation and by the parties.)

Motion for Judgment

Thereupon, at the close of said hearing, after both parties had rested and before the Court had announced its decision, the defendant filed its written motion for judgment on the pleadings and the evidence, which motion is in the following words:

Comes Now the defendant, the United States of America, by its attorneys, Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, and Lester L. Gibson, Special Asst. to the Atty. Gen., and moves the Court [fol. 181] for judgment in its favor and for its costs, on the ground that the pleadings and the evidence are insufficient to support a judgment in favor of the plaintiff.

Chas. D. McAvoy, United States Attorney. By Thomas J. Curtin, Lester L. Gibson, Spec. Asst. to Atty. General.

Thereupon, the defendant, by its counsel, with leave of the Court first having been obtained, filed its written request for findings of fact and conclusions of law, and the ruling of the Court had thereon as to each separate request and finding is in words and figures as follows:

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, upon the merger, in addition to being designed and used by the respective former owners for the same general purpose, were duplicates, and the title search plants of each included the same information; and they were two of the three most complete and extensive title insurance plants existing in the City of Philadelphia at the date of the merger on October 31, 1927.

I refuse so to find.

II. That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as a result of the said merger and/or consolidation, consisted of two parts, namely (1) abstracts of title of the public records of Philadelphia County, including deeds, mortgages, sheriffs' deeds, assignments, releases, etc., all [fol. 182] indexed, plotted and located on plans of the City as subdivided into sections and blocks, and (2) separate abstracts of title, searches and opinions in each matter for which the company issued its title insurance policy, or obligations of such nature.

I refuse so to find.

III. That for the purposes of the merger and/or consolidation the value placed thereon at $800,000.00 each in-

cluded both the complete plants, as defined in the foregoing paragraph, and it is not contended by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, nor does the evidence indicate that the second part, namely, separate abstracts of title, searches and opinions in each matter for which the former company issued its title insurance policy, or obligation of such nature, was abandoned or otherwise, but the testimony shows that this part of both title insurance plants was used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, during the fiscal period beginning November 1, 1927, and ending October 31, 1928; and it is that part of the title insurance plant commonly called "title search plant" and formerly owned by The Land Title and Trust Company which The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contends was abandoned and became obsolescent during the fiscal period beginning November 1, 1927, and ending on October 31, 1928.

I refuse so to find.

IV. That prior to the merger and/or consolidation and the organization on the 31st day of October, 1927, and the opening for business on November 1, 1927, of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, [fol. 183] all of the parties thereto knew that only the Real Estate Title Insurance and Trust Company's search plant would be used in its business, and the determination to store the title search plant of The Land Title and Trust Company was arrived at during the month of October, 1927, and immediately thereafter and during said month posting of the records of the said plant was discontinued, and the officers and directors of The Land Title and Trust Company immediately proceeded to store these records, the greater part of which was done during the month of October, 1927, and completed immediately thereafter.

I refuse so to find.

V. That after the merger and/or consolidation and the issuance of letters patent to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, on October 31, 1927, the title search plant of The Land Title and Trust Company was no longer used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, in any manner relative to the search of the public records or the abstracting of titles, and no further posting of the

books of The Land Title and Trust Company's search plant was done or in any manner kept up-to-date by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, from the date of the commencement of business on November 1, 1927, or otherwise used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner.

I refuse so to find.

VI. That although the title search plant of The Land Title and Trust Company was never advertised for sale and no honest effort was made to dispose of it by sale, upon [fol. 184] inquiry by interested parties, the president of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, sometime during the early part of 1928, placed a tentative price thereon of $1,000,000.00, which was in excess of the value placed upon the complete title insurance plant for the purposes of the merger; and although the testimony of The Real Estate-Land Title and Trust Company's witnesses was that there was a great amount of good will in the title insurance business attributable to applications, separate abstracts of title, searches and opinions, briefs of title and the possession of a complete title search plant in connection with the title insurance business, it did not segregate or show the amount of this good will and prestige value.

I refuse so to find.

VII. That the information and other data contained in the title search plant of The Land Title and Trust Company, stored by The Real Estate-Land Title and Trust Company's predecessor in October, 1927, was as valuable and essentially the same at the end of the fiscal period ended October 31, 1928, as it was on October 31, 1927, the date of the organization of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, and prior to the opening for business on November 1, 1927, and if brought down to date at the end of the fiscal year of plaintiff-petitioner on October 31, 1928, it would be essentially the same complete title plant as it was prior to the date upon which The Land Title and Trust Company ceased to post the books; that the expense of bringing a complete title search plant, such as that formerly possessed by The Land Title and Trust Company, down to date for the twelve-month

[fol. 185] period in the City of Philadelphia, ended October 31, 1928, would not exceed $75,000.00.

I refuse so to find.

VIII. That the officers and directors of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, were former directors and officers of the three merging companies and as such had wide experience in the title insurance business and the conduct of title search plants in the City of Philadelphia; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, knew—and the facts clearly show—that prior to its organization one of the title search plants acquired by it as a result of the merger would not be used in its business, and although The Real Estate-Land Title and Trust Company, plaintiff-petitioner, has not indicated for what purpose the duplicate plants were acquired, the facts and circumstances clearly indicate that the acquisition of the two plants would give to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, a greater amount of business in the City of Philadelphia than it otherwise would have, since it is admitted that upon the consolidation and merger there remained only one other complete title search plant in the City of Philadelphia, and would result in the retaining of the same amount of business as was theretofore done by two separate plants, with the advantage of the reduction in cost of operation of only one title search plant, which clearly shows that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was compensated by increased business and lessened cost on account of the non-user of the title search plant of the [fol. 186] former The Land Title and Trust Company.

I refuse so to find.

IX. The title search plant of the former The Land Title and Trust Company, which was never used by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contained the same information that was contained in any complete title search plant in the City of Philadelphia, and upon the date of the merger and/or consolidation of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, it was essentially as valuable as that of the other title search plant taken into the merger, as is evidenced by the value placed thereon, and on October 31, 1928, there was no diminution in the information contained therein

though not in use for a period of twelve months, and was essentially as valuable for the purpose for which it was constructed, in regard to title insurance, up to and including the date on which its books ceased to be posted. From all of which it may be reasonably concluded that the acquisition of the title search plant by The Real Estate-Land Title and Trust Company plaintiff-petitioner, was not for the purpose of use in the business.

I refuse so to find.

X. The complete title insurance plant of The Land Title and Trust Company was carried on the books of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as an asset account without diminution in value other than the sum of $50,000.00 sought to be taken as a deduction in its return of income for the period ended October 31, 1928.

I refuse so to find.

[fol. 187] XI. That any loss attributable to a particular year for obsolescence or otherwise is a loss occurring by reason of something happening in that year; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, did not use the title search plant of the former The Land Title and Trust Company during the year under review.

I refuse so to find.

Conclusions of Law

I. That there is no authority in any statute permitting deductions for obsolescence of property which was not used in the trade or business during the taxable year.

I make this conclusion.

II. That the statute contemplates a reasonable allowance for obsolescence of tangible property used in the trade or business where the property is a wasting asset, but the information contained in a title search plant that it is not of such character as contemplated by the applicable statutes on obsolescence.

I refuse to make this conclusion.

III. That the acquisition of the title search plant of The Land Title and Trust Company by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was a capital transaction resulting in a permanent benefit to plaintiff-petitioner, through the elimination of competition, an

added good will and the handling of the combined business at a reduction of operating cost.

I refuse to make this conclusion.

IV. That the intangible good will value to The Real [fol. 188] Estate-Land Title and Trust Company, plaintiff-petitioner, on account of the possession of the title search plant of The Land Title and Trust Company is not subject to obsolescence.

I make this conclusion.

V. That The Real Estate-Land Title and Trust Company, plaintiff-petitioner, is not entitled to recover.

I refuse to make this conclusion.

VI. That judgment should be for the defendant.

I refuse to make this conclusion.

By The Court.

—— ——, J.

Thereupon, plaintiff, by its counsel, with leave of the court first having been obtained, filed its written requests for findings of fact and conclusions of law, the ruling of the court had thereon as to each separate request and finding is in words and figures as follows:

Plaintiff's Requests for Findings of Fact and Conclusions of Law

1. The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above-entitled proceeding, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal office at the southwest corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania (Stipulation Par. I).

I so find.

[fol. 189] 2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795), plaintiff-petitioner herein, on January 15, 1929, filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928, in which the amount of net income reported by the plaintiff-petitioner was $2,551,-

776.91, upon which amount of net income there was shown due on the said return for the said fiscal year Federal income tax in the amount of $312,592.67. (Stipulation Pars. 2 and 3.)

I so find.

3. The said amount of Federal income tax, namely, $312,592.67, shown due as aforesaid for the fiscal year ending October 31, 1928, was assessed against the said The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, and was paid by the said The Real Estate-Land Title and Trust Company to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following instalments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

(Stipulation Par. 4.)

I so find.

4. An additional income tax in the amount of $865.06 was assessed against plaintiff-petitioner by the Commissioner [fol. 190] of Internal Revenue based upon a taxable net income determined by said Commissioner to be $2,558,838.64 for the plaintiff-petitioner's fiscal year ending October 31, 1928, which said additional tax of $865.06, with interest thereon amounting to $83.31, was paid by plaintiff-petitioner to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, on September 3, 1930 (Stipulation Pars. 5 and 6).

I so find.

5. The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, was formed by the consolidation and merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company in accordance with the terms of an agreement entered into by said three companies and a majority of the Directors of each of them under date of October 3, 1927 (Stipulation Pars. 7 and 8).

I so find.

6. The agreement of consolidation and merger was ratified by the stockholders of the three corporations, parties thereto, and a charter issued to the plaintiff-petitioner by the Governor of Pennsylvania on October 31, 1927. The Directors of the plaintiff-petitioner held their organization meeting at 3:15 P. M. on October 31, 1927 and the plaintiff-petitioner opened for business on November 1, 1927 (Stipulation Pars. 9 and 10).

I so find.

7. All of the capital stock of the said The Real Estate-Land Title and Trust Company was issued to the former stockholders of the three merging corporations in consider-[fol. 191] ation for the assets of said corporations acquired by the said The Real Estate-Land Title and Trust Company, including the title plant of the Land Title and Trust Company, so that the entire interest and control in such property remained in the same persons (Stipulation Par. 11).

I so find.

8. The Real Estate-Land Title and Trust Company, plaintiff-petitioner, engages, inter alia, in the title insurance business, including searches and insurance of titles of real estate.

I so find.

9. The said title plant formerly owned by the Land Title and Trust Company was acquired by it during the years 1886 and 1887 at a cost of $251,509.84. Additions to said plant were made in the years 1888, 1889 and 1890 at a cost of $24,541.78. From 1890 to February 28, 1913 at least $317,645.36 was expended in maintaining the said title plant and keeping it up to date, which materially increased the value of the said title plant (Stipulation Par. 13).

I so find.

10. Each of the title plants formerly owned by the said Land Title and Trust Company and the said Real Estate Title Insurance and Trust Company was taken into the merger at a valuation of $800,000 (Stipulation Par. 11).

I so find.

11. No deduction was ever claimed by or allowed to the said Land Title and Trust Company for income tax purposes for depreciation, wear and tear, obsolescence, amor-

[fol. 192] tization or depletion on the said title plant formerly owned by the said Land Title and Trust Company up to and including October 31, 1927, the date of the merger (Stipulation Par. 18).

I so find.

12. No deduction has ever been allowed to the plaintiff-petitioner for income tax purposes on account of depreciation, wear and tear, obsolescence, amortization, depletion or abandonment of the said title plant formerly owned by the said Land Title and Trust Company (Stipulation Par. 19).

I so find.

13. The negotiations for the merger were first taken up by the West End Trust Company and the Real Estate Title Insurance and Trust Company and they had agreed on a two-company merger before the Land Title and Trust Company was considered as a party to the merger, which was not until the latter part of September 1927, about two weeks before the merger agreement was signed (Testimony page 19).

I so find.

14. When the merger agreement was signed, there was no definite plan about the disposition of the title plants then owned by the Land Title and Trust Company and the Real Estate-Title Insurance and Trust Company (Testimony page 21).

I so find.

15. The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927 (Testimony pages 23-4).

I so find.

[fol. 193] 16. No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October 1927. To keep the plant up to date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927 and ending October 31, 1928 (Testimony page 152).

I so find.

17. After the merger agreement was executed, an examination of the title plants of the Land Title and Trust Com-

pany and the Real Estate Title Insurance and Trust Company was made to determine the best use to make of the plants and to see whether they might be used together (Testimony page 21).

I so find.

18. Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Testimony pages 58 and 142).

I so find.

19. After said investigation, it was determined that the plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Testimony pages 5, 6 and 8).

I so find.

20. The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises [fol. 194] No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November 1927 (Testimony page 66).

I so find.

21. About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed (Testimony page —).

I so find.

22. Negotiations were carried on for the sale of the title plant formerly owned by the Land Title and Trust Company with the Bankers Trust Company of Philadelphia as a prospective purchaser in the early part of 1928 and a price of $1,000,000 was put on the plant by Mr. J. Willison Smith, President of the plaintiff-petitioner, but the negotiations fell through and no offer for the said title plant was ever received by the plaintiff-petitioner in any amount (Testimony pages 25-6).

I so find.

23. The said title plant formerly owned by the Land Title and Trust Company was abandoned by the plaintiff-petitioner during its fiscal year commencing November 1, 1927 and ending October 31, 1928.

I so find.

24. The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence [fol. 195] during the plaintiff's fiscal year commencing November 1, 1927 and ending October 31, 1928 and became obsolete on or before October 31, 1928.

I so find.

25. The fair market value on March 1, 1913 of the said title plant formerly owned by the Land Title and Trust Company was not less than $1,000,000 (testimony page 148—Mecutchen). The fair market value on March 1, 1913 of the said title plant formerly owned by the Land Title and Trust Company was $1,250,000 (testimony page 101—Robins).

I find that on March 1, 1913 the fair market value of the said title plant was $1,000,000. I refuse to find that its fair market value at said time was $1,250,000.

26. The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land Title and Trust Company was not more than $125,000 (testimony page 148—Mecutchen). The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land Title and Trust Company was $100,000 (testimony page 103—Robins).

I find that on October 31, 1928 the fair market value of the said title plant was $125,000. I refuse to find that its fair market value at said time was $100,000.

27. The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927 and ending October 31, 1928 in an amount equal to the difference between [fol. 196] the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and the fair market value of said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount not less than $875,000 (testimony of Mecutchen supra). The plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000 (testimony of Robins supra).

I find the facts to be in accordance with the first two sentences of said request, but I refuse to find, as requested in the last sentence, that the plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000.

28. On or about December 12, 1930, plaintiff-petitioner herein filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claim for refund of Federal income tax for the fiscal year ending October 31, 1928 in the amount of $153,125.00 on Form 843, alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the said title insurance plant (formerly owned by the Land Title and Trust Company) during the said fiscal year (Stipulation Par. 20).

I so find.

29. The then Commissioner of Internal Revenue refused to refund to plaintiff-petitioner herein the said amount of $153,125.00, or any other amount for the fiscal year ending October 31, 1928, and on the 20th day of February 1931 the then Commissioner of Internal Revenue disallowed the said claim for refund filed by plaintiff-petitioner herein for the [fol. 197] fiscal year ending October 31, 1928 (Stipulation Par. 21).

I so find.

30. This action was brought for the recovery of Federal income tax, which income tax is an internal revenue tax and was collected by Joseph S. McLaughlin as Collector of Internal Revenue for the First District of Pennsylvania, the said Joseph S. McLaughlin having been Collector of Internal Revenue for the First District of Pennsylvania at the times of the payment of the income tax and interest, for the recovery of which this proceeding was instituted. The said Joseph S. McLaughlin was dead at the time this proceeding was commenced and therefore not in office as Collector of Internal Revenue at such time, and no part of the said income tax or interest, for the recovery of which this proceeding was instituted, was paid to the Collector of Internal Revenue for the First District of Pennsylvania who was in office at the time this proceeding was commenced (Stipulation Par. 22).

I so find.

31. This proceeding was commenced after the passage of the Revenue Act of 1921, for the recovery of an internal revenue tax alleged by plaintiff-petitioner to have been erroneously and illegally assessed and collected. This suit was brought within six years after the right accrued for which claim is made in this proceeding (Stipulation Par. 23).

I so find.

[fol. 198] Conclusions of Law

1. The merger and consolidation of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company was effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the 3rd day of May A. D. 1909, P. L. 408, and supplements thereto.

I make this conclusion.

2. The merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company on October 31, 1927 was a transaction in which no gain or loss to any of the said Companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act of Congress properly applicable thereto (Stipulation Par. 17).

I make this conclusion.

3. No deduction was properly allowable to the Land Title and Trust Company for income tax purposes at any time, prior to the merger of October 31, 1927 on account of depreciation, wear and tear, obsolescence, amortization or depletion on the title plant formerly owned by the said Land Title and Trust Company and acquired by the plaintiff-petitioner upon the merger.

I make this conclusion.

4. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 all losses sustained by [fol. 199] it during said year not compensated for by insurance or otherwise.

I refuse to make this conclusion.

5. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of

Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for the obsolescence of any of its assets used in its business.

I make this conclusion.

6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company.

I make this conclusion.

7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolesence to the title plant formerly owned by the Land Title and Trust Company.

I make this conclusion.

8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title [fol. 200] plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928.

I make this conclusion.

9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000.

I make this conclusion.

10. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the amount of $1,150,000.

I refuse to make this conclusion.

11. Counsel for plaintiff-petitioner shall calculate and submit to the Trial Judge the amount of refund of income tax to which the plaintiff-petitioner is entitled under the

above findings, and thereafter a judgment or decree shall be entered in favor of the plaintiff-petitioner and against the defendant for the amount of income tax properly refundable to the plaintiff-petitioner for its fiscal year ending October 31, 1928, with interest thereon as allowed by law.

I so rule.

Welsh, J.

Filed March 31, 1937.

Whereupon, on the 15th day of March, 1937, the Court being in session, filed its opinion deciding in favor of the plain-[fol. 201] tiff and against the defendant, which said opinion is in words and figures as follows:

Opinion

Trial Before the Court Without a Jury.

Welsh, J.:

This case is before us upon petition of the Real Estate-Land Title and Trust Company to recover from the United States $153,208.31 alleged to be an overpayment of income tax for the fiscal year ending October 31, 1928. The claim is based upon the refusal of the Collector of Internal Revenue to allow a deduction for obsolescence of a title search plant alleged to have been abandoned as useless during that year.

The facts upon which the issue must be determined were submitted by stipulation of the parties and by oral testimony before the Court sitting without a jury. Counsel have specifically requested findings of the facts upon which the Court shall reach its conclusion, and for that reason we briefly summarize the evidence important to the issue.

In September of 1927, while negotiations for merger were pending between the Real Estate Title Insurance & Trust Company and the West End Trust Company, a proposal was made to include in the consolidation, the Land Title and Trust Company. As a result, an agreement was entered into on October 3, 1927 under which those three companies merged and became the Real Estate-Land Title & Trust Company by approval of the merger and issuance of letters [fol. 202] patent on October 31, 1927. The new company succeeded to the corporate powers of the merging corporations and took over their assets under the terms of the

agreement. Among them were two title search plants formerly maintained by the Real Estate Title Insurance & Trust Company and by the Land Title & Trust Company respectively, which plants contained substantially the same title information and records. The plant of the Real Estate Title was begun in 1876 and that of the Land Title in 1886, and from then on, both plants were enlarged and kept up to date at great expense by the continuous acquisition of current recordings down to the time of the merger. They were valued for merger purposes at $800,000.00 each, carried on the books of the new company at $1,600,000.00, and deductions were made for depreciation or obsolescence of the Land Title plant on Report of Shares filed with the Commonwealth of Pennsylvania at the rate of $50,000.00 per year.

Pending consummation of the merger, it was not determined what use or disposition would be made of the two plants to be acquired, but soon thereafter and prior to the granting of letters patent, certain officers of the new company made a survey of both plants and decided to try out the operation of the Real Estate Title plant alone, holding the Land Title plant in reserve. The trial was successful for the company and decided finally that it would be most advantageous to maintain the Real Estate Title plant and discard the other, inasmuch as it required only forty-three employees as against 124 for the Land Title plant, and was simpler in operation. In October and continuing through part of November, 1927, the Land Title plant was removed [fol. 203] from the former offices and stored at 517 Chestnut Street where it has remained to the present time. It was used at first in connection with title matters then pending, especially those relating to properties to be sold at the sheriff's sale of November, 1927, and subsequently only on infrequent occasions as a reference to avoid the necessity of inspecting the public records. The plant was never continued by the addition of current recordings, (which during the year would have included 227,498 entries) and there is no direct evidence as to what the company ultimately intended to do with it. In 1928 unsuccessful negotiations were had for its sale, but since then, because of the obsolete condition of the plant, the expense of bringing it down to date, the cost of operation, the decline in the volume of title business and the fact that a title insurance business may be carried on without such a complete and expensive plant, it has

become, as a practical matter, actually unsaleable. For similar reasons and also because the plaintiff has a complete and less expensive plant, it has been discarded and neglected and is now considered to have only a salvage value.

Plaintiff filed its income tax for the year ending October 31, 1928, reporting net income of $2,551,776.91 on which it paid a tax of $312,592.67 and later an additional assessment of $865.06. No deduction had ever been claimed or allowed for depreciation, obsolescence or amortization of the plant in question while it was owned by the Land Title. But on December 12, 1930, the plaintiff filed a claim for refund of income tax paid for the taxable year, 1928, in the amount of $153,208.31, alleging that it was entitled to deduct for ob- [fol. 204] solescence during that year $1,250,000.00 representing the whole value of the Land Title plant alleged to have been abandoned. The entire claim was disallowed by the Revenue Collector.

The questions arise as to whether the plant became useless and was actually abandoned during the year 1928, and therefore obsolete within the meaning of the law; or whether at the time it was acquired it was a valueless duplicate of a similar asset owned and used by the company, and therefore not a proper subject upon which to base a claim for obsolescence.

The Revenue Act of 1928, Section 23, allows tax payers to deduct from their income a reasonable allowance for depreciation and obsolescence, the basis for which is the difference between the value on March 1, 1913, if acquired before that date, and the value at the time of the sale or other disposition of the property (Sec. 113). This privilege applies where the assets for which the deduction is claimed was acquired by the tax payer in connection with a reorganization or merger in which at least 80% of the interests remain in the same persons, which circumstances exist in the present case (Sec. 113-a, 7; Fairbanks Court Wholesale Grocery Co. vs. Commissioner, 84 Fed. 2d, 18, 1936). If the obsolescence claimed was an actual loss during the year and not covered by insurance then it would seem conclusive that the deduction must be allowed.

Obsolescence, though defined in many ways, may for the present purposes be deemed to be the means or process by which property ceases to be useful or adequate for the busi-

ness of the tax payer, whether as a result of prohibitory laws, changes in the art, loss of trade, inadequacy or other [fol. 205] things, apart from physical deterioration, causing a diminution of the value and usefulness to the purpose for which it was acquired. (Burnett vs. Niagara Falls Brewing Co., 282 U. S. 648, 1931; United States vs. Wagner Electric Mfg. Co., 61 Fed. 2d, 204, 1932; United States Cartridge Co. vs. United States, 284 U. S. 511; Stroh Brewery Co. vs. Commissioner, 16 B. T. A. 1192). There is no doubt that the Land Title plant had value and was useful at the time acquired, or that because of the non-user, the failure to maintain it, and the decline in title business subsequent thereto, it was stored, discarded and became practically useless and valueless in the business. In addition, the officers of the company have declared, without contradiction, that the plant has been actually abandoned, is not intended to be used again, and that a sale although considered has not been found possible. Although property merely placed in storage and not sold or actually abandoned is not a proper subject for a claim of obsolescence (Marigold Garden Co. vs. Commissioner, 6 B. T. A. 368), the facts in the present case would seem to meet the standard of abandonment required as a basis of a deduction under the Act, in that it indicates the intention of the owners to discard the property coupled with such physical abandonment as to confirm that intention. (Foxrun Paper Co. vs. Commissioner, 28 B. T. A. 1184, 1933; Reuben H. Donnally Corp., 26 B. T. A. 107; I. G. Zumwalt, 25 B. T. A. 566.)

On the other hand we are asked by defendant to infer from the facts and circumstances presented, that because the plaintiff knew the plant in question was a duplicate at the time of acquisition, it was never intended to be used and [fol. 206] therefore never constituted a useful asset or the subject of a proper claim for obsolescence. If such were the fact, we would find no difficulty in deciding the issue according to the principle of Article 172, Regulation 74, and the cases holding that assets acquired with the expectation of voluntarily abandoning them (Liberty Baking Co. vs. Heiner, 34 Fed. 2nd, 513) or merely to dispense with competition (Newspaper Printing Co. vs. Commissioner, 56 Fed. 2d, 125) do not constitute deductible losses; although even that rule has been modified and a loss allowed where assets were acquired and scrapped with the view to limiting competition (Sanitary Mfg. Co. vs. Commissioner, 34

Fed. 2d, 439, 1929). But here we fail to find anything which clearly establishes an intention to abandon the plant prior to its acquisition. J. Willison Smith, President successively of the West End Trust Company and of the plaintiff herein, states, that he assumed the Land Title plant would be used as the basis of the new business or combined with the other plant, the survey of the two plants to determine their usefulness was not made until after the new company was bound by the agreement to acquire both plants, and the Land Title plant was actually used to a limited extent after the merger. These circumstances do not indicate any definite previous intention to abandon as worthless the plant in question, nor are we precluded from considering the possible intention of the company to merge the better elements of both plants to form a new one, or even to sell one or the other for the purposes of the business. We decline to presume the existence of an intention to completely discard the plant prior to its acquisition, and on the contrary affirm that there is no [fol. 207] proof of any intention that would bar the present claim of abandonment and obsolescence. It has already been decided that a useless and discarded title or abstract plant is a proper subject of a claim for obsolescence (Crooks vs. Kansas City Title Co. 46 Fed. 2nd, 928, 1931) and that the deduction can be taken in the year in which the loss was sustained (Reg. 74, Art. 173), and we are convinced that the facts here present just such a case.

As to the amount of the deduction to be allowed, we note that two well qualified experts have given values of $1,000,000.00 and $1,250,000.00 respectively of the Land Title plant as of March 1, 1913 and $125,000.00 and $100,000.00 respectively as of October 31, 1928, the date of the claim for obsolescence. No contrary testimony has been submitted, but the suggestion is made that the plant should be considered as of greater value because of the good will attaching thereto and because of the advantage to the new company from reduced competition. However, it does not appear that there is any good will attached to the plant which is separate and distinct from the good will of the whole business of the former owner acquired by the plaintiff in the merger; nor has it been shown that the acquisition of that plant has enhanced the business and is valuable in itself. On the contrary, the title business of the new company was substantially less than the aggregate title business done by the two separate companies during the pre-

vious year. The burden of establishing values is on the plaintiff and the values given by the experts have not been denied as to amount. These appraisals being at best only the opinions of experts, we believe the circumstances warrant the fixing of the more conservative values, and we find [fol. 208] that the value on March 1, 1913 was $1,000,000.00 and that the salvage value as of October 31, 1928 was $125,000.00 making an actual loss from obsolescence for the taxable year 1928 of $875,000.00. The tax payer was entitled to deduct that amount for the taxable year, and since the tax has already been paid, it is now entitled to recover the difference between the tax paid and the amount which would have been payable had the deduction been taken and allowed at that time.

We believe that this conclusion is in line with the principle that tax laws are to be liberally construed in favor of the taxpayer (Farmers' Loan vs. Minnesota, 280 U. S. 204-212; Bowers vs. New York & Albany Co., 273 U. S. 346-350) and that the plaintiff in this case has sustained the burden of showing an actual deductible loss as required by law (Reinecke vs. Spalding, 280 U. S. 227).

Counsel are directed to submit a calculation showing the computation for income tax for the taxable year ending October 31, 1928, including the allowance for obsolescence of the title plant in question in the amount of $875,000.00, and judgment may thereafter be entered for the plaintiff in the amount shown to have been paid by the tax payer in excess of the actual tax found to be due in accordance herewith.

Thereafter, on March 31 and after notice to defendant, the following judgment order was made and entered of record as of March 31, 1937:

And Now, to wit, this 25th day of March A. D. 1937 a calculation showing the computation for plaintiff's income tax for the taxable year ending October 31, 1928 having been submitted by counsel, which calculation is hereto attached, [fol. 209] judgment is entered in favor of the plaintiff, The Real-Estate Land Title and Trust Company, and against the defendant, the United States of America, in the amount of $107,270.81 with interest at 6% per annum on $948.37 thereof from September 3, 1930, on $78,148.16 thereof from

December 15, 1929 and on $28,174.28 thereof from July 14, 1929.

By the Court,

Welsh, J.

Adjusted net income as set forth in letter from Commissioner of Internal Revenue dated June 6, 1930	$2,558,838.64
From which deduct allowance for obsolescence of title plant allowed by opinion of Welsh, J.	875,000.00
Corrected net income	1,683,838.64
Total income tax payable on corrected net income	206,270.23
Income tax previously assessed and paid	313,457.73
Overpayment of income tax	107,187.50
Interest paid September 3, 1930 on additional assessment of tax	83.31
Total overpayment of income tax and interest actually paid	$107,270.81

Judgment should be entered in the above amount of $107,270.81 with interest as follows:

On $948.37 thereof from September 3, 1930.
On $78,148.16 thereof from December 15, 1929.
On $28,174.28 thereof from July 14, 1929.

[fol. 210] The defendant excepted, and its exceptions were noted and allowed.

Thereafter, on, to wit, May 14, 1937, the District Court settled the bill of exceptions as filed, which contained all of the testimony as well as opening statement and argument of counsel, and it having been called to his attention that the bill as settled contained much redundant and irrelevant matter in no way pertinent to the issue to be presented to the appellate court and that the testimony could be shortened by condensing the same, and for cause shown and on motion

of the defendant an order was entered withdrawing the bill as then filed and extending the term and the time for filing a new Bill of Exceptions, of which the following, caption omitted, is a copy:

PETITION TO WITHDRAW BILL OF EXCEPTIONS AND REQUEST FOR EXTENSION OF TIME FOR FILING NEW BILL

"Comes the defendant, the United States of America, by its attorney, J. Cullen Ganey, Jr., United States Attorney, by Thomas J. Curtin, Assistant United States Attorney, and petitions the Honorable George A. Welsh, Judge of the United States District Court for the Eastern District of Pennsylvania before whom the above-entitled cause was tried and judgment thereon entered in favor of the plaintiff on March 31, 1937, to withdraw the bill of exceptions which was settled and filed on May 14, 1937, and requests that the term be extended at least forty days for the filing of a new bill of exceptions, and for reasons therefore, states:

[fol. 211] 1. That the bill of exceptions as now settled and filed contains much redundant and irrelevant matter which in no way relates to the issues to be presented to the appellate court in this case.

2. That the transcript of the testimony can be shortened by reducing to narrative form and eliminating that portion thereof which does not relate to the issue or issues presented to the appellate court.

3. That the Solicitor General has not at this date determined whether an appeal shall be taken from the decision of this Court, or whether an appeal shall be taken as to one of the questions presented to this Court or as to all of the questions presented, and at this time it is not possible to determine what portion of the record should be eliminated from the bill of exceptions and what portion should be retained therein.

"The Court is Therefore Respectfully Petitioned and Requested to enter an order withdrawing the bill of exceptions as now settled and filed and to grant an extension of the term for filing and settling a new bill of exceptions

for at least forty days from the date of the expiration of the present term of this Court.

Respectfully submitted, (S.) J. Cullen Ganey, Jr., United States Attorney. Thomas J. Curtin, Assistant United States Attorney.

[fol. 212] And now to wit, June 11th, 1937 the prayer of the within petition is granted.

Welsh J."

Thereafter, and within the term as extended by the foregoing order, upon motion by the defendant and for good cause shown, the following order extending the term for the filing of bill of exceptions was made and entered, of which the following, caption omitted, is a copy:

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

"Upon application of the United States Attorney for the Eastern District of Pennsylvania to the District Court for the Eastern District of Pennsylvania on behalf of the defendant herein,

"It is Hereby Ordered that the time for preparing, settling, allowing and filing the bill of exceptions on appeal in this cause to the United States Circuit Court of Appeals for the Third Circuit be and the same is hereby extended for a period of fifty days from July 24, the expiration date of the extension heretofore granted, and that the time for printing and filing the record is hereby extended to and including October 31, 1937.

Dated this 14th day of July, 1937.

(S.) W. H. Kirkpatrick, United States District Judge, Eastern District of Pennsylvania."

[fol. 213] Thereafter, and within the term as extended by the foregoing order, upon motion by the defendant and for good cause shown, the following order extending the term for the filing of bill of exceptions was made and entered, of which the following, caption omitted, is a copy:

ORDER EXTENDING TERM

"And Now, to wit: this thirteenth day of September, A. D. 1937, the term for filing the Bill of Exceptions and the time therein is hereby extended up to and including October 13, 1937, in the September 1937 Term of said Court.

Welsh, J."

EXHIBIT A

United States of America

U. S. Seal

Treasury Department, Washington

February 1, 1936.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Corporation Income Tax Return for fiscal year ended October 31, 1928 (with schedules attached), filed by Real Estate-Land Title and Trust [fol. 214] Company, Philadelphia, Pennsylvania on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld, Chief Clerk, Treasury Department.
(Seal.)

JGL. W. W. Bauer. THL. CV. SSF. HO. H.

Form 66—Revised November, 1929—Treasury Department, Chief Clerk and Superintendent

U. S. Government Printing Office: 1929 2—8615

Corporation Income Tax Return for Fiscal Year 1928

(Stamped) Filed.

Fiscal Year begun Nov. 1, 1927, and ended Oct. 31, 1928.

File this return not later than the Fifteenth Day of the Third Month following the close of the fiscal year.

Print plainly corporation's name and business address.

[fol. 215] (Name) Real Estate-Land Title and Trust Company.

(Street and number) Broad and Chestnut Sts.

(Post office and State) Philadelphia, Pa.

Date of Incorporation October 31, 1927.
Under the Laws of what State or Country Penna.

Form 1120A

U. S. Internal Revenue

(Auditor's Stamp)

Memo 272C. Rev. Act, 1928

Assessment

Tax $865.06

Computation proved.

Penalty ....
Interest 83.31
Total $948.37

✓

Basis OA or RAR 10-16-29.
Audited by Nora Rentz 1923/6/30.
Unit No. AR-CJ5.

List ....

(Stamped) Aug. 23, 1930.

(In pencil) #4.

Page 3. Line 1

(Vertically, in pencil) RAR in Special File.

[fol. 216] Page 1 of Return. (In pencil) 12.

File Code 303.

(Stamped) Jan. —, 1929.

Serial Number 400028 (Cashier's Stamp).

(Stamped) Not Delinquent. Jan. 16, 1929. Phila. 1st Int. Rev. Pa.

(Stamped) Received Jan. 15, 1929. Phila. 1st Int. Rev. Pa.

(Stamped) Pennsylvania. Carried as above district.

(In pencil) S.

✓

Cash Check M. O. Cert. of Ind.

First Payment

$ ....
Carded
As

(In Pencil) 78148 17

Kind of Business Banking.

Is This a Consolidated Return? No.

Gross Income

Item and Instruction No.

1. Gross sales from trading or manufacturing, less returns and allowances	$
2. Less cost of goods sold:	
[fol. 217] (a) Inventory at close of preceding year	$
(b) Merchandise bought for sale	
(c) Cost of manufacturing or otherwise producing goods (from Schedule A)	
(d) Total of lines (a), (b), and (c)	$
(e) Less inventory at end of year	
3. Gross profit from trading or manufacturing (Item 1 minus Item 2)	$
4. Gross profit from operations other than trading or manufacturing. (State source of income):	
(a) Details on schedule attached	2,341,702.44
(b)	
(c)	
5. Interest on bank deposits, notes, mortgages, and Corporation Bonds	3,630,264.83
6. Rents	
7. Royalties	
8. Profit from sale of real estate, stocks, bonds, and other capital assets (from Schedule B)	204,747.17
9. Dividends on stock of domestic corporations included in Schedule A-5	
10. Other income (including dividends received on stock of foreign corporations). (State nature of income):	
(a) Schedule A-10-A	4,513.25
[fol. 218] (b) Schedule A-10-B	8,002.21
(c)	
11. Total income in items 3 to 10	$6,189,229.90

Deductions

12. Compensation of officers (from Schedule C) See Schedule 22 A	$
13. Rent on business property	215,062.95

A

14. Repairs (from Schedule D) Ordinary building maintenance	9,040.54
[“(From Schedule D)” struck out]	
15. Interest	1,472,875.69
16. Taxes (from Schedule E)	144,815.33
17. Losses by fire, storm, etc. (from Schedule F)	
18. Bad debts (from Schedule G)	
19. Dividends (from Schedule H)	
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (from Schedule I)	173,407.28
21. Depletion of mines, oil and gas wells, timber, etc. (submit schedule, see Instruction 21)	
22. Other deductions not reported above. (Explain below, or on separate sheet):	
(a) Salaries and wages. (Not included in Item 2, 12, or 14 above) Schedule 22 A	1,591,081.74
(b) Net loss for prior year. (Submit schedule) Schedule 22 B	31,169.46
(c)	
(d)	
(e)	
[fol. 219] (f)	
23. Total deductions in items 12 to 22	$3,637,452.99
24. Net income (Item 11 minus Item 23)	$2,551,776.91

Computation of Tax

25. Net income (Item 24 above)	$2,551,776.91
26. Less credit of $2,000 (for a domestic corporation having a net income of less than $25,270)	None
27. Balance (Item 25 minus Item 26)	$2,551,776.91

28. Income tax (13½% of Item 27) 2 months — $57,414.98
29. *If the net income of a domestic corporation is less than $25,270, enter the amount in excess of $25,000* 12 pct. 10-months 255,177.69
[Italicized portion of above item struck out; "12 pct. 10-months" inserted]

30. Total tax (Item 28 plus Item 29) $312,592.67
31. Less: Income tax paid at source. (This credit can only be allowed to a non-resident foreign corporation) .... $
32. Income and profits taxes paid to a foreign country or to a Possession [fol. 220] of the United States by a domestic corporation ....

33. Balance of tax (Item 30 minus Items 31 and 32) $312,592.67
[Pencil mark encircles above total.]

An amended return must be marked "Amended" at top of return.
Checks and drafts will be accepted only if payable at par.
[In pencil, at bottom of sheet]
344 489 88
306 213 23
[In pencil on left margin of sheet]
39
0
10
14
84
[Stamped, initialed and dated]
Return to be audited on separate basis.
JHL NW 10/28/29
Auditor Date
Chief Section

....
Chief, Section C
[Pencil mark encircles above stamp, etc.]

[fol. 221] **Page 2 of Return.**

Schedule A—Cost of Manufacturing or Producing Goods
(See Instruction 2)

Items	Amount
Salaries and wages	$
Material and supplies	

Items	Amount (Enter as Item 2c)
	$

[fol. 222]

Schedule B—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

(See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowable Since Acquisition	5. Cost	6. Value as of March 1 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 8)
4947 Chestnut St.	1927	$ –	$ 212.05	$ 10,056.31	$ –	$ –	$ 9,844.26
523 Chestnut St.		400,000.00	17,310.06	400,000.00	–	–	17,310.06
Conshohocken Rd.		316,762.38	4,014.93	316,762.38	–	–	4,014.93
Automobiles	1926	333.25	176.05	728.38	–	–	77.40
"	1926	275.00	968.71	1,394.96	–	–	151.25
Stocks & Bonds	See Schedule B-1 annexed						193,495.09
							204,747.17

State how property was acquired ....

[fol. 223] Schedule C—Compensation of Officers

(See Instruction 12)

[In tabular form with all columns blank except as noted; columns headed as follows:]

1. Name of Officer [Typewritten under this heading:] See schedule 22 B
2. Official Title
3. Time Devoted to Business

Shares of Stock Owned

4. Common
5. Preferred
6. Amount of Compensation (Enter as Item 12)

Schedule D—Cost of Repairs

(See Instruction 14)

1. Items	2. Amount (Enter as Item 14)
Salaries and Wages	$

Schedule E—Taxes Paid

(See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
Phila. City Property Tax	$
517 Chestnut St.	24,815.33
Penna. Capital Stock Tax	120,000.00
	144,815.33

[fol. 224] Schedule F—Explanation of Losses by Fire, Storm, Etc. (See Instruction 17)

[All columns blank; columns headed as follows:]

1. Kind of Property
2. Date Acquired

3. Cost
4. Value as of March 1, 1913
5. Subsequent Improvements
6. Depreciation Allowable Since Acquisition
7. Insurance and Salvage Value
8. Deductible Loss (Enter as Item 17)

State how property was acquired ....

Schedule G—Bad Debts

(See Instruction 18)

[Columns headed as follows:]

1. Year
2. Sales on Account
3. Bad Debts

1923
1924
1925 [All columns blank]
1926
1927

Schedule H—Dividends Deductible

(See Instruction 19)

[All columns blank; columns headed as follows:]

1. Name of Corporation

Amount of Dividends

[fol. 225] 2. Domestic

3. Foreign

Schedule I—Explanation of Deduction for Depreciation

(See Instruction 20)

[All columns blank unless otherwise noted; columns headed as follows:]

1. Kind of Property (If buildings, state material of which constructed) [Typewritten under this heading:] See Schedule 18

Seal

2. Date Acquired
3. Age When Acquired
4. Probable Life After Acquirement
5. Cost (Exclusive of Land)
6. Value as of March 1, 1913 (Exclusive of Land)

Amount of Depreciation Charged Off

7. Previous years
8. This year

Seal

Attach a separate sheet if any of the above schedules do not provide sufficient space.

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Page 3 of Return

Schedule K—Balance Sheets

(See Instruction 43)

[All columns blank; columns headed as follows:]

[fol. 226] Items

Beginning of Taxable Year
- Amount
- Total

End of Taxable Year
- Amount
- Total

Assets

1. Cash
2. Notes receivable
3. Accounts receivable
   Less reserve for bad debts
4. Inventories:
   Raw materials
   Work in process
   Finished goods
   Supplies
5. Investments:
   Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia

Securities issued under the Federal Farm Loan Act, or under such Act as amended
Obligations of the United States or its possessions
6. Loans (describe fully):
7. Deferred charges:
Prepaid insurance
Prepaid taxes
8. Capital assets:
Land
Buildings
Machinery and equipment
Furniture and fixtures
[fol. 227] Delivery equipment
Less reserves for depreciation and depletion
9. Patents
10. Good will
11. Other assets (describe fully):
12. Total Assets

Liabilities
13. Notes payable
14. Accounts payable
15. Accrued expenses (describe fully):
16. Other liabilities (describe fully):
17. Capital stock:
Preferred stock (less stock in treasury)
Common stock (less stock in treasury)
18. Surplus
19. Undivided profits
20. Total Liabilities

Remarks ....

[Typewritten] Schedules Annexed

[Stamped:] Received Oct. 30 1929 Office of Head, Audit Review Division.

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Page 4 of Return

Schedule L—Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net income from Item 24, page 1 of the return $2,551,776.91

2. Nontaxable income:	
[fol. 228] (a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	159,995.70
(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended	
(c) Interest on obligations of the United States or its possessions	
(d) Dividends deductible under Section 234(a) 6 of the Revenue Act of 1926	√31,946.43
(e) Proceeds of life insurance policies paid upon the death of the insured	
(f) Other items of nontaxable income (to be detailed):	
(1)	
•(2) Fees in Reserve for Taxes	33,332.26
•(3) Interest do.	5,795.22
3. Charges against reserve for bad debts, if Item 18, page 1 of return, is not an addition to a reserve	
4. Charges against reserves for contingencies, etc. (to be detailed):	
(a) Reserve for Contingencies	20,913.63
deductions	
(b) " " Depreciation	123,407.28
(c) Refund of Income Tax	31.33
5. Total of Lines 1 to 4, inclusive	$2,927,198.76
6. Total from Line 14	676.230.96
[fol. 229] 7. Net profit for year as shown by books, before any adjustments are made therein (Line 5 minus Line 6)	$2,250,967.80
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	
9. Other credits to surplus (to be *de*detailed):	
(a)	
(b)	
(c)	
10. Total of Lines 7 to 9, inclusive	$2,250,967.80

11. Total from Line 17	1,500,000.00
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	$ 750,967.80
13. Unallowable deductions:	
(a) Donations, gratuities, and contributions	$
(b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claimed as a credit in Item 32, page 1 of the return	312,418.75
(c) Federal taxes paid on tax-free covenant bonds	
(d) Special improvement taxes tending to increase the value of the property assessed	
(e) Furniture and fixtures, additions, or [fol. 230] betterments treated as expenses on the books	35,680.06
(f) Replacements and renewals	
(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary	
(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation	
(i) Additions to reserve for bad debts which are not included in Item 18, page 1 of return	
(j) Additions to reserves for contingencies, etc. (to be detailed):	
(1) Organization Expenses	√34,906.20
(2) Reserve for Bldg. Operations	147,959.76
(3) Profit on assets not on books	21,308.39
(k) Other unallowable deductions (to be detailed):	
(1) Stocks Charged off	1,000.00
(2) Alterations charged off	55,411.46

(3) Profit on Bonds in excess of Book Profit	67,546.34
14. Total of Line 13	$ 676,230.96
15. Dividends paid during the taxable year [fol. 231] (state whether paid in cash, stock of the corporation or other property):	
(a) Date paid 1/30/28 Character Cash	$ 375,000.00
(b) Date paid 4/30/28 Character Cash	375,000.00
(c) Date paid 7/31/28 Character Cash	375,000.00
(d) Date paid 10/31/28 Character Cash	375,000.00
16. Other debits to surplus (to be detailed):	
(a)	
(b)	
(c)	
17. Total of Lines 15 and 16	$1,500,000.00

• Taxed in 1927

Questions

Kind of Business

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manu- [fol. 232] facturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc., State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power

(hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(Elevators, warehouses, stockyards etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) [fol. 233] which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) H—Banking.

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation)
active

Affiliations with Other Corporations

See Instruction 38

4. Does the corporation own 95 per cent or more of the outstanding capital stock of another domestic corporation or of other corporations? No.

5. Is over 95 per cent or more of your outstanding capital stock owned by another corporation? No.

6. Is 95 per cent or more of your outstanding capital [fol. 234] stock as well as 95 per cent or more of the outstanding capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals, partnerships, or corporations in substantially the same proportion? No.

7. If the answer to questions 4, 5, and 6, or to any of them, is "yes," answer the following:

(a) Did the corporation file Forms 851, 852, 853, and 853A for the taxable year 1922 or subsequent taxable years? ✓ If the answer to this question is "yes," these forms will not be required, except under the circumstances described in question (b). If the answer to this question is "no," and the answer to questions 4, 5, and 6, or to any of them, is "yes," procure from the Collector of Internal Revenue for your district Forms 851, 852, 853, and 853A, Affiliations Schedules 1, 2, 3, and 4, which shall be filled in and filed as a part of this return. If the answer to this question is "no," question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the Affiliations Schedules filed for 1927 or prior years, obtain during the entire taxable year 1928? Yes. If the answer to this question is "no," a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted on Form 853, Affiliations Schedule 3. If there are companies other than those covered by the Affiliations Schedules for prior years which, applying the tests contained in questions 4, 5, or 6 may have come into the affiliated group since 1927, Forms

[fol. 235] 851, 852, 853, and 853A, are required for the entire group for the taxable year.

(c) Did the corporation file a consolidated return for the preceding taxable year? No.

Predecessor Business

8. Did the corporation file a return under the same name for the year preceding taxable year?, No. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? Yes. If answer is "yes," give name and address of each predecessor business, and the date of the change in entity. West End Trust Co.-Real Estate Title Insurance & Trust Co.-Land Title & Trust Co.-Philadelphia. Upon such change were any asset values increased or decreased? ——. If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

9. Is this return made on the basis of actual receipts and disbursements? No. If not, describe fully what other basis or method was used in computing net income.

Accrual basis.

List of Attached Schedules

10. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the taxpayer should be [fol. 236] placed on each separate schedule accompanying the return.

A-4 Gross Profits from Operations other that trading.
A-5 Interest received.
B-1 Profit or Loss—Sale of Bonds & Stocks.
A-10-a Other Income.
A-10-b Other Income.
I—Depreciation.
22a Other Deductions.

22b Other Deductions.
K Balance Sheets.

. . . .

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. . . .

. . . .

(Stamp) Received Oct. 30, 1929, Office of Head Audit Revenue Division.

Affidavit

We the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year as stated, pursuant to the Revenue Act of 1926 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this 15th day of January, 1929.

I hereby certify that I am not a Stockholder, Director or Owner in the above Corporation, party hereto.

[fol. 237] (Notarial Seal)

Howell Ed. Roberts . . . . . (Title)
(Signature of officer administering oath)
2—14579

(Notary Public)

My Commission expires at the end of next Session of Senate

(Corporate Seal)

J. Willison Smith,
President.

Wm. Smith,
Treasurer.

Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-4 Gross Profits from Operations Other Than Trading

Trust Department Fees	$468,132.58
Title & Conveyancing & Plant Fees	1,073,462.06
Registration Fees	31,840.94
Rents—517 Chestnut St.	8,068.17
Real Estate Fees	540,252.79
Commissions	19,386.67
Safe Deposit Rentals	37,537.52
Package Rentals	307.50
Carrying Charges on Real Estate Investments	162,714.21
	$2,341,702.44

[fol. 238] Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-5. Interest Received

Interest Credited to Profit & Loss	$3,826,825.30	
Interest Credited to Reserves	1,176.88	
	$3,828,002.18	
Interest Credited to Profit & Loss in 1928 But Transferred By Revenue Agent to Return for 1927	5,795.22	
		$3,822,206.96
Less—Non Taxable interest on bonds as detailed in annexed schedule	159,995.70	√
—Dividends included in above total as detailed in annexed schedule	31,946.43	√
		191,942.13
		$3,630,264.83

[fol. 239]

Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-5-1—Non-Taxable Interest on Bonds

6 M	County of Allegheny	4¼	1931	$ 255.00
31 M	" " "	4¼	1936	1,317.50
22 M	" " "	4¼	1937	935.00
76 M	" " "	4¼	1938	3,230.00
48 M	" " "	4¼	1939	2,040.00
11 M	" " "	4¼	1940	467.50
10 M	" " "	4¼	1941	425.00
2 M	" " "	4¼	1954	85.00
5 M	" " "	4¼	1955	212.50
15 M	Borough of Eddystone, School District	4½	1942	633.75
22 M	Borough of Eddystone, School District	4½	1952	924.50
10 M	Borough of Eddystone, School District	4½	1957	412.50
25 M	Borough of Glenolden	4½	1957	1,056.25
20 M	City of Johnstown	4¼	1941	800.41
20 M	" " "	4¼	1944	800.41
10 M	" " "	4¼	1950	400.17
20 M	" " "	4¼	1951	800.41
20 M	" " "	4¼	1952	800.41
25 M	City of New Castle School District	4¼	1956	991.66
25 M	City of New Castle, School District	4¼	1957	991.66
2 M	Borough of Lansdale	4¼	1944	79.32
7 M	" " "	4¼	1945	277.64
2 M	" " "	4¼	1946	79.32
2 M	" " "	4¼	1947	79.32

[fol. 240]

7 M	" " "	4¼	1948	277.64
1 M	" " "	4¼	1949	39.67
4 M	Township of Paradise, School District	4½	1937	169.00
11 M	Township of Paradise, School District	4½	1957	464.75
615,847.76	City of Philadelphia, Mandami			59,683.58
10 M	City of Philadelphia	3	1930	300.00
14,900.00	City of Philadelphia	3½	1932	521.50

15 M	City of Philadelphia	3½	1934	525.00
323 M	" " "	4	1943	5,048.01
300 M	" " "	4	1942	11,766.66
2 M	" " "	4	1946	64.72
10 M	" " "	4	1945/7	207.79
50 M	" " "	4	1975	2,000.00
225 M	" " "	4¼	1945/75	9,455.69
321 M	" " "	4¼	1946/76	12,941.11
98 M	" " "	4¼	1946/76	4,078.11
321 M	" " "	4¼	1947/77	13,060.92
216 M	" " "	4¼	1945/75	9,435.00
101 M	" " "	4½	1949	4,191.00
11 M	" " "	4¼	1943	467.50
25 M	" " "	4¼	1952	1,062.50
25 M	" " "	4¼	1944	1,062.50
5 M	" " "	4½	1944	225.50
5 M	City of St. Petersburg	6	1933	300.00
10 M	City of St. Petersburg	6	1934	600.00
10 M	City of St. Petersburg	6	1935	600.00
17 M	Township of Springfield	4¼	1956	722.50

[fol. 241]

25 M	Borough of Stroudsburg	4¼	1947	997.60
10 M	Borough of Stroudsburg	4¼	1952	400.04
30 M	Borough of Stroudsburg	4¼	1957	1,197.12
	U. S. Liberty Bonds			35.06
				√$159,995.70

Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-5-2 Dividends Received

Consolidated Gas Co. of New York	$ 1,250.00
Darby, Media & Chester St. Rwy. Co	756.00
Duquesne Traction Co	1,000.00
Electric & Peoples Traction Co. Trust Ctfs	2,000.00
Georgia Power Co	1,500.00
Germantown Pass. Rwy. Co	262.48
Green & Coates St. Pass. Rwy	239.20
Illinois Central Stock Trust Ctfs	2,000.00
Pennsylvania R. R. Co	7,218.75
Peoples Passenger Ry. Stock Trust Ctfs	1,000.00
Philadelphia Bourse	30.00
Philadelphia Traction Co	8,000.00
Standard Ice Mfg. Co	675.00
United Gas Improvement Co	6,000.00
Middle States Utilities Co	15.00
	$31,946.43

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Real Estate-Land Title & Trust Company-Philadelphia

Schedule B-1 Profits and Losses From Sales of Bonds, Stocks, etc.

Par Values	Descriptions	Dates Acquired	Dates Sold	Costs	Proceeds of Sales	Taxable Profits	Deductible Losses
$5,000.00	Alabama & Great Southern Rwy. 5s 1957	Since 1913	1927 Dec. 5	$4,837.50	$4,874.38	$36.88	
121,500.00	American Gas & Electric Co. 5s 2028	Since 1913	1928 May 23	122,411.25	122,490.00	78.75	
50,000.00	American Tel. & Tel. Co. 4s 1929	Since 1913	1927 Nov. 23	46,062.50	49,775.00	3,712.50	
1,000.00	Appalachian Power Co. 5s 1956	Since 1913	Dec. 15	988.61	994.50	5.89	
25,000.00	Aluminum Co. of America 5s 1952	Since 1913	Dec. 6	24,937.50	25,312.50	375.00	
1,000.00	Arkansas Power & Light Co. 5s 1956	Since 1913	1928 May 21	1,010.83	1,000.00		$10.83
25,000.00	Baltimore & Ohio R. R. 6s 1929	Since 1913	Jan. 4	24,952.50	25,625.00	672.50	
75,000.00	Chesapeake Corp. 5s 1947	Since 1913	Feb. 3	70,312.50	74,756.25	4,443.75	
50,000.00	Chicago & Eastern Ill. Rwy. Co. 5s 1951	Since 1913	1927 Nov. 30	42,937.50	46,525.00	3,587.50	
100,000.00	Chicago, Milwaukee, St. Paul and Pacific Rwy. Co. 5s	Since 1913	1928 Oct. 27	96,415.98	75,428.00		20,987.98

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4,000.00	Cleveland, Cincinnati Chicago and St. Louis Rwy. 4s 1991	Since 1913	1928	June 16	3,310.00	3,687.00	377.00	
5,000.00	Cleveland & Pittsburgh R. R. 3½s 1948	Since 1913	1927	Nov. 30	4,497.02	4,533.75	36.73	
25,000.00	Cities Service Co. 5½s 1942	Since 1913	1928	Apr. 7	24,000.00	24,168.75	168.75	
50,000.00	Columbus Rwy. Power & Light Co. 4½s 1957	Since 1913	1928	Feb. 4	47,456.25	47,587.50	131.25	
40,000.00	Consolidated Gas & Electric Light & Power Co. 5s 1965	Since 1913	1927	Dec. 3	40,500.00	41,800.00	1,300.00	
60,000.00	Duquesne Light Co. 4½s 1967	Since 1913	1928	Feb. 3	57,250.00	60,900.00	3,650.00	
10,000.00	1512 Spruce Street 6s 1943	Since 1913		May 21	9,852.00	10,100.00	248.00	
10,000.00	1500 Walnut Street 6s 1947	Since 1913		Sept. 13	9,974.50	10,275.00	300.50	
1,000.00	4661-7 Frankford Ave. 6s 1929	Since 1913		June 25	2,000.00	2,005.00	5.00	
25,000.00	Georgia Power Co. 5s 1967	Since 1913		Sept. 15	24,342.29	24,562.50	220.21	
100,000.00	Illinois Central R. R. Co. 4¾s 1966	Since 1913	1927	Dec. 6	96,437.51	101,552.50	5,114.99	
100,000.00	Illinois Central Stock Trust Ctfs. 4s 1952	Prior to 1913	1928	Apr. 23	96,000.00	81,000.00		15,000.00
1,000.00	Jacobs Building 6s 1933	Since 1913	1928	Oct. 9	1,000.00	1,005.00	5.00	

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Real Estate-Land Title & Trust Company-Philadelphia

Schedule B-1 Profits and Losses From Sales of Bonds, Stocks, etc.

Par Values	Descriptions	Dates Acquired	Dates Sold	Costs	Proceeds of Sales	Taxable Profits	Deductible Losses
$25,000.00	Jefferson R. R. Co. 5½s 1928	Since 1913	Feb. 16	$24,500.00	$25,250.00	$750.00	
57,000.00	Kansas, Oklahoma & Gulf R. R. 6s	Since 1913	July 2	57,500.00	58,140.00	640.00	
50,000.00	Lake Shore & Michigan Southern Rwy. 4s 1931	Prior to 1913 Since 1913	May 27	22,687.50) 22,468.75)	49,718.72	4,562.47	
30,000.00	Lehigh Valley R. R. Co. 4½s 2003	Since 1913	1928 June 14	29,475.00	29,925.00	450.00	
36,000.00	Lehigh Valley R. R. Co. of N. Y. 4½s 1940	Since 1913	June 16	35,730.00	36,168.00	438.00	
9,000.00	Louisville & Nashville R. R. 7s 1930	Since 1913	Feb. 11	9,000.00	9,444.37	444.37	
3,000.00	Majestic Hotel Co. 6s 1930	Since 1913	May 5	4,000.00	4,009.00	9.00	
50,000.00	Mobile & Ohio R. R. Co. 4½s 1977	Since 1913	1927 Dec. 10	47,375.00	49,775.00	2,400.00	
50,000.00	N. Y. Central & Hudson River R. R. 3½s 1997	Prior to 1913	Nov. 30	42,187.50	43,275.00	1,087.50	
[illegible]0,000.00	N. Y. Central & Michigan Central 3½s 1998	Since 1913	Nov. 29	42,125.00	42,250.00	125.00	
25,000.00	N. Y. Central & Lake Shore 3½s 1998	Since 1913	Dec. 1	18,906.25	21,106.25	2,200.00	

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100,000.00	N. Y. Central R. R. 5s 2013	Since 1913	1928	June 16	106,062.50	107,250.00	1,187.50	
25,000.00	N. Y. Telephone Co. 4½s 1939	Since 1913		Oct. 24	18,621.25	25,062.50	6,441.25	
100,000.00	Norfolk & Western Rwy. 4s 1944	Prior to 1913		Mar. 30	105,000.00	96,182.50		8,817.50
22,000.00	Nashville Rwy. & Light Co. 5s 1953	Since 1913		Apr. 16	22,154.00	22,715.00	561.00	
50,000.00	New Orleans Public Service 5s 1955	Since 1913		Mar. 28	48,207.50	50,275.00	2,067.50	
25,000.00	North American Edison Co. 5s 1957	Since 1913	1927	Nov. 22	24,475.00	25,387.50	912.50	
25,000.00	Ohio Edison Co. 5s 1957	Since 1913	1928	Feb. 17	25,125.00	25,512.50	387.50	
15,000.00	Omaha & Council Bluffs Rwy. and Bridge Co. 6s 1947	Since 1913		Sept. 17	14,962.50	14,987.50	25.00	
25,000.00	Oregon R. R. & Navigation Co. 4s 1946	Since 1913		June 12	23,312.50	23,375.00	62.50	
100,000.00	Oregon Short Line R. R. Co. 4s 1929	Since 1913	1927	Nov. 22	86,031.25	99,550.00	13,518.75	
25,000.00	Penn Central Light & Power Co. 4½s 1977	Since 1913	1928	Jan. 30	23,776.10	23,937.50	161.40	
25,000.00	Penn Central Light & Power Co. 4½s 1977	Since 1913		Mar. 3	23,786.40	23,750.00		36.40
25,000.00	Penna. Co. 4s 1931	Prior to 1913	1927	Dec. 5	23,968.75	24,762.50	793.75	

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Real Estate-Land Title & Trust Company-Philadelphia

Schedule B-1 Profits and Losses From Sales of Bonds, Stocks, etc.

Par Values	Descriptions	Dates Acquired		Dates Sold	Costs	Proceeds of Sales	Taxable Profits	Deductible Losses
50,000.00	Penna. Ohio & Detroit R. R. 4½s 1977	Since 1913	1928	Feb. 6	47,375.00	50,400.00	3,025.00	
25,000.00	Penna. R. R. Co. 6s 1935	Since 1913		Feb. 11	25,397.50	26,750.00	1,352.50	
4,000.00	Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. 4½s 1942	Prior to 1913		June 16	4,127.50	4,062.00		65.50
1,000.00	Phila. Electric Co. 5½s 1947	Since 1913		July 3	992.50	1,075.00	82.50	
50,000.00	Phila. Electric Co. 4½s 1967	Since 1913		Oct. 24	49,162.50	50,250.00	1,087.50	
2,000.00	Phila. Electric Co. 6s 1941	Since 1913	1927	Dec. 1	1,975.00	2,150.00	175.00	
30,000.00	Public Service Corp. N. J. 6s Perpetual	Since 1913	1928	Jan. 25	33,175.80	34,650.00	1,474.20	
3,000.00	Public Service Corp. N. J. and Rights 4½s	Since 1913		May 13	3,061.13	4,186.50	1,125.37	
25,000.00	Public Service Electric & Gas Co. 5½s 1959	Since 1913		Mar. 31	23,125.00	26,250.00	3,125.00	
50,000.00	Reading Co.-Jersey Central 4s 1951	Since 1913		June 14	47,013.75	47,000.00		13.75

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2,000.00	Second & Allegheny Ave. 6s 1930	Since 1913		Apr. 3	2,020.00	2,000.00		20.00
17,000.00	Second & Allegheny Ave. 6s 1930	Since 1913		May 7	17,000.00	17,135.00	135.00	
50,000.00	San Joaquin Light & Power Co. 5s 1957	Since 1913		Jan. 27	49,750.00	51,250.00	1,500.00	
75,000.00	Sixty-third & Walnut Sts. 6s 1939	Since 1913		June 20	75,000.00	75,375.00	375.00	
75,000.00	Southern Pacific Co. 4½s 1977	Since 1913		Mar. 10	75,687.50	77,475.00	1,787.50	
110,000.00	Southern Pacific Co. 4½s 1968	Since 1913		Mar. 9	109,450.00	109,500.00	50.00	
25,000.00	Southern Pacific Co. 4s 1955	Since 1913		Sept. 28	22,906.25	23,200.00	293.75	
50,000.00	Southern Rwy. Co. 4s 1956	Since 1913	1927	Nov. 14	42,181.25	45,813.75	3,632.50	
3,000.00	Standard Power & Light Co. 6s 1957	Since 1913	1928	Apr. 30	3,011.25	3,090.00	78.75	
25,000.00	Strawbridge & Clothier 6s 1942	Since 1913		Sept. 6	25,120.00	27,500.00	2,380.00	
25,000.00	Tacony-Palmyra Bridge Co. 6s 1952	Since 1913		Feb. 23	24,937.50	25,000.00	62.50	
60,000.00	Texas & Pacific Rwy. 5s 1977	Since 1913		Oct. 25	59,550.00	61,080.00	1,530.00	
50,000.00	Texas Power & Light Co. 5s 1937	Since 1913		Apr. 24	50,312.50	51,275.00	962.50	
5,000.00	Touraine Bldg. Co. 5¾s 1932	Since 1913		Jan. 10	5,000.00	5,025.00	25.00	
60,000.00	U. S. 4th L. L. 4¼s	Since 1913	1927	Nov. 22	53,704.06	62,381.25	8,677.19	
35,000.00	U. S. Rubber Co. 6½s 1932/7	Since 1913	1928	Mar. 7	35,987.27	35,105.00		882.27

Real Estate-Land Title & Trust Company-Philadelphia

Schedule B-1 Profits and Losses From Sales of Bonds, Stocks, etc.

Par Values	Descriptions	Dates Acquired	Dates Sold	Costs	Proceeds of Sales	Taxable Profits	Deductible Losses
65,000.00	Union Pacific R. R. Co. 4½s 1967	Since 1913	June 12	63,050.00	64,057.50	1,007.50	
75,000.00	Virginia Rwy. Co. 5s 1962	Since 1913	Jan. 26	76,436.67	81,318.75	4,882.08	
50,000.00	Western Maryland R. R. 4s 1952	Since 1913	1927 Nov. 30	41,422.50	43,125.00	1,702.50	
21,000.00	Western New York & Penna. Rwy. 5s 1937	Prior to 1913	1928 Sept. 18	22,260.00	21,378.00		882.00
25,000.00	Western Union Tel. Co. 4½s 1950	Prior to 1913	1927 Nov. 28	23,562.50	25,130.00	1,567.50	
33,000.00	Western Union Tel. Co. 5s 1951	Since 1913	1928 July 11	32,917.50	34,006.50	1,089.00	
13,000.00	York Haven Water & Power Co. 5s 1951	Since 1913	1928 Aug. 1	13,587.50	13,650.00	62.50	
Stocks							
200 shs.	Duquesne Light Co. Pfd.	Since 1913	Jan. 5	19,463.89	19,511.11	47.22	
3,074 shs.	Estey-Welte Corp.	Since 1913	May 17	6,158.00	2,659.07		3,498.93
1,709 shs.	Suburban Title & Trust Co.	Since 1913	1927 Nov. 25	222,170.00	358,890.00	136,720.00	
				$3,160,975.81	$3,354,470.90	$243,710.25	$50,215.16
			Losses			50,215.16	
			Net Profit			$193,495.09	
			Taxable Profit		$ 193,495.09		
					$3,160,975.81		

[fol. 249] Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-10-a-Other Income

Recovery on account of failure, N. C. Henderson	$ .40
Recovery on account of failure of Bank of Wyoming	.66
Recovery on account of failure, of Bank of Munger, Mich.	1.45
Recovery of old account of Land Title & Trust Co.	2.37
Recovery of old account of Real Estate T. & Tr. Co.	6.00
Interest on old account of Real Estate T. & Tr. Co.	2.35
Recovery on account of John L. Wanson, Bankrupt	3.75
Recoveries from David and Henrietta B. Goff	10.13
Draft on Paris refunded	17.67
Clerk of Court, Difference in list not claimed	10.00
Recoveries on Philadelphia Life Insurance Co. checks	9.14
Difference in Deposit of Corn Exchange Nat'l Bank Recovered	10.00
Liability on old Outstanding drafts closed out	259.69
Credit received on account Lafayette Hotel Coupon	2.00
Excess amount received from sale of collateral [fol. 250] over amount of loan of C. E. Turner—whereabouts unknown	28.10
Collateral on loan of Lena Perlman taken over and adjustment made in accounts to value of collateral	529.50
Loan of Geo. S. Wolbert previously written off, restored to account, including interest	568.19
Ground rent collateral on loan of Ellis Thompson taken over and adjustment made in accounts to value of collateral	137.34
Loan of Wm. G. Carroll previously written off, restores to accounts	1,100.00
Refund of Assignment fee	4.50
Refund of interest on settlement account items	2.66
Proceeds from sale of materials	150.00

Adjustment of error in Interstate Rwy. Co. coupon account	28.00
Refund of insurance subsequent to sale of 523 Chestnut Street	723.85
Adjustment of Accrual on water rents and taxes	905.50
	$4,513.25

Real Estate-Land Title & Trust Company—Philadelphia

Schedule A-10-b-Other Income

Recoveries on account of Loans previously charged off Branson & Co.	$ 100.00
R. L. Clement Bldg. & Loan Assn.	1,089.80
[fol. 251] Fink Bangert & Co.	3,000.00
Belle Parker Fricke	276.25
F. B. Hays	3,366.00
A. E. Pyle	120.16
E. E. Ross	50.00
	$8,002.21

Real Estate-Land Title & Trust Company—Philadelphia

Schedule I—Depreciation (Assets Acquired during the year 1928)

Buildings	Cost	Rates	Amount
3212 Susquehanna Ave.			
Land	$ 2,000.00		
Buildings	4,200.18	1 Pct.	$42.00
7159 Torresdale Ave.			
Land	1,500.00		
Buildings	5,005.41	1 Pct.	50.05
48th & Pine Street			
Land	62,500.00	Land	
Buildings	217,942.36	1 Pct.	2,179.42
	293,147.95		2,271.47

Buildings	Cost	Rates	Amount
Furniture & Fixtures	$ 61,247.42	10 Pct.	$ 6,124.74
Automobiles	2,660.70	12½ Pct.	332.59
[fol. 252] Alterations	341,423.71	5 Pct.	17,071.18
Title Plant (obsolescence)			50,000.00
	Total		$ 75,799.98

Summary	Depreciation
Acquired with West End Trust Co. assets	$ 49,800.07
Acquired with Real Estate T. Ins. & Tr. Co. assets	38,117.92
Acquired with Land Title & Trust Co. assets	9,689.31
Acquired since Nov. 1, 1928	75,799.98
	$175,407.28

[fol. 253]

Real Estate Land Title & Trust Company—Philadelphia

Schedule I—Depreciation—(West End Trust Company Assets)

Dates Acquired	Costs	Rates	Depreciation Prior Year	Depreciation This Year	Depreciation Totals
Buildings					
1897 to 1913	$465,355.58	2 Pct.	$238,384.88	$9,307.11	$247,691.99
	371,485.29	Land			
	163,159.13	Appreciation			
	750,000.00	do.			
	$1,750,000.00		$238,384.88	$9,307.11	$247,691.99
Furniture & Fixtures					
1923	$22,897.85	Balance	$20,608.03	$2,289.82	$22,897.85
1924	15,370.93	20 Oct.	10,759.64	3,074.19	13,833.83
1925	3,344.37	20 "	1,672.19	668.87	2,341.06
1926	4,005.42	20 "	1,201.62	801.08	2,002.70

[fol. 254]

	1927	7,088.70	20 "	708.87	1,417.74	2,126.61
		$52,707.27		$34,950.35	$8,251.70	$43,202.05
Alterations						
	1924	$87,487.11	10 Pct.	$34,994.84	$8,748.71	$43,743.55
	1925	83,692.30	10 "	25,107.69	8,369.23	33,476.92
	1926	35,922.78	10 "	7,184.56	3,592.28	10,776.84
	1927	111,717.56	10 "	11,171.76	11,171.76	22,343.52
		$318,819.75		$78,458.85	$31,881.98	$110,340.83
Automobiles						
	1925	$1,394.96	25 Pct.—3⅓ mos.	$871.85	$96.86	$968.71
	1926	1,049.68	25 Pct.	393.63	262.42	656.05
		$2,444.64		$1,265.48	$359.28	$1,624.76

[fol. 255]

$49,800.07

Real Estate Land Title & Trust Company—Philadelphia

Schedule I—Depreciation—

(Real Estate Title Insurance & Trust Company Assets)

Dates Acquired	Costs	Rates	Depreciation Prior Years	Depreciation This Year	Depreciation Totals
Buildings					
523 Chestnut St., Phila., Pa.					
	$190,000.00	2 Pct. 8⅔ mos.	$14,566.67	$2,743.39	$17,310.06
	210,000.00	Land			
	$400,000.00		$14,566.67	$2,743.39	$17,310.06
[fol. 256]					
517 Chestnut St., Phila., Pa.					
	$406,666.00	Land			
	100,000.00	Fixtures			
	493,334.00	2 Pct.	$32,888.93	$9,866.68	$42,755.61
	$1,000,000.00		$32,888.93	$9,866.68	$42,755.61

Building Improvements					
1925	$110,634.46	2 Pct.	$5,172.95	$2,212.69	$7,385.64
	1,000.00	"	26.66	20.00	46.66
	$111,634.46		$5,199.61	$2,232.69	$7,432.30
Vault	$15,000.00	2 Pct.	$1,150.00	$300.00	$1,450.00
Furniture & Fixtures					
1924	$100,598.50	20 Pct.	$33,532.84	$20,119.70	$53,652.54
1925	9,210.21	"	2,149.04	1,842.04	3,991.08
[fol. 257]					
1926	3,256.84	"	434.25	651.37	1,085.62
	$113,065.55		$36,116.13	$22,613.11	$58,729.24
Other Real Estate					
262 W. Roosevelt Blvd.					
1927	$2,000.00	Land			
	7,450.40	2 Pct.		$149.00	$149.00
5947 Chestnut Street					
1927	4,000.00	Land			
	20,335.00	2 Pct.	5⅔ mos.	212.05	212.05
	33,785.00			$38,117.92	

[fol. 258]

Real Estate Land Title & Trust Company—Philadelphia

Schedule I—Depreciation—

(Land Title & Trust Company Assets)

Assets	Dates Acquired	Costs	Annual Rates	Depreciation Amounts	Depreciation Period	Amounts
Buildings						
Conshohocken Road						
Land		$46,437.64				
Construction Cost		232,909.94	2 Pct.	$4,658.20	6½ mos.	$2,523.18
Additions	1928	24,574.80	1 "	245.75	6½ mos.	133.11
		$303,922.38		$4,903,95		$2,656.29
Furniture and Fixtures						
	1923	$11,675.07	10 Pct.	$1,167.51	1 year	$1,167.51
	1924	5,742.56	20 "	1,144.51	"	1,144.51
[fol. 259]						
	1925	2,447.98	" "	489.59	" "	489.59
	1926	10,877.77	" "	2,175.55	" "	2,175.55
	1927	8,040.18	" "	1,608.03	" "	1,608.03
		$38,783.56		$6,585.19		$6,585.19
Automobiles						
	1926	$728.38	25 Pct.	$182.09	9⅓ mos.	$141.58
	1927	1,225.00	" "	306.25	1 year	306.25
		$1,953.38		$488.34		$447.83
						$9,689.31

[fol. 260] Real Estate-Land Title & Trust Company—Philadelphia

Schedule 22A—Other Deductions

Salaries: Officers	$310,438.93	
Others	814,490.95	
Directors Fees	22,200.00	
Pensions	28,901.60	
Printing and Stationery		$65,642.72
Supplies		59,682.05
Advertising		36,472.41
Dues & Subscriptions		30,911.47
Postage		18,526.26
Telephone & Telegraph		16,044.08
Travelling & Automobile Expense		14,640.80
Insurance		21,831.99
Legal & Auditing		67,603.05
Employees' Suppers		9,370.47
Examinations		9,905.20
Searches, etc.		25,655.75
Recording		5,053.21
Miscellaneous Expenses		27,376.17
Maintenance 517 Chestnut St.		1,881.00
Heat, Light & Power 517 Chestnut St.		4,453.63
	$1,176,031.48	$415,050.26
Total	$1,591,081.74	

[fol. 261] Real Estate-Land Title & Trust Company—Philadelphia

Schedule 22-B—Other Deductions

Title Losses	$18,694.53
Adjustments of Depositors Accounts	442.34
Checks Cashed, no account	276.09
Miscellaneous adjustments of Customers' Accounts	670.64
T. & C. Fees Receivable, charged off	10,875.88
Overdrafts written off	186.70
Overdraft—Real Estate Title Insurance & Trust Company Dividend Account	23.28
	$31,169.46

Real Estate-Land Title & Trust Company—Philadelphia

Schedule K—Balance Sheets

	November 1, 1927	October 31, 1928
Assets:		
Real Estate	$3,029,347.58	$2,303,450.40
Time & Demand Loans	53,307,493.51	58,421,538.54
Bonds & Stocks	13,058,488.88	13,641,448.24
Cash	7,263,432.59	6,015,026.65
[fol. 262] Petty Cash	17.50	20.53
Exchanges for Clearing House		515,008.05
Settlement Account	194,169.53	649,596.71
Accrued Interest	475,219.78	651,992.09
Title Plant	1,600,000.00	*1,550,000.00
Customers Liability Letters of Credit	14,685.81	136,745.92
Miscellaneous Fees Receivable	171,668.48	235,263.65
Carrying Charges—Real Estate		178,761.75
	$79,114,523.66	$84,298,852.53

* Check (X) mark after this figure in the above column. "50,000," written at bottom of this sheet.

Real Estate-Land Title & Trust Company—Philadelphia

Schedule K—Balance Sheets

	November 1, 1927	October 31, 1928
Capital Stock	$7,500,000.00	$7,500,000.00
Surplus	15,000,000.00	15,000,000.00
Undivided Profits		750,967.80
Deposits	54,787,737.03	54,280,942.59
Mortgage on Real Estate	600,000.00	
[fol. 263] Miscellaneous Liabilities	5,966.27	
Letters of Credit and Acceptance Issued	14,685.81	136,341.92
Unearned Interest	1,951.49	4,125.30

	November 1, 1927	October 31, 1928
Bills Payable	800,000.00	5,900,000.00
Dividends Unpaid	67,110.00	
Accrued Expenses	31,411.40	6,303.38
Accrued Taxes	105,127.48*	454,872.40
Accrued Interest	200,534.18	117,339.38
Building Operations Reserve		147,959.76
	$79,114,523.66	$84,298,852.53

* Includes:

Reserve for Contingencies	$20,913.63
Fees and Interest	39,127.48

Carried forward from other Co. books. Never charged as expense.

[fol. 264] EXHIBIT "B"

United States of America

(Shield)

Treasury Department,

Washington

February 5, 1936.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated March 20, 1930 (with statement attached, minus Forms 866 and 882 mentioned therein), to The Real Estate-Land Title and Trust Company, Philadelphia, Pennsylvania, from David Burnet, Deputy Commissioner on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

F. A. Birgfeld, Chief Clerk, Treasury Department.
H. (Seal of Treasury Department, by direction of the Secretary of the Treasury.)

W. M. L., W. W. Bauer, T. H. L., C. J., S. S. F., H. O.
Treasury Department, Chief Clerk and Superintendent.
[fol. 265] U. S. Government Printing Office, 1929. Form 66—Revised November, 1929 2—8615
(564 M) NP-1b-26-28
IT: AR: C-5
NOR

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

Sirs:

A review of the report submitted by the Internal Revenue Agent in Charge, Philadelphia, Pennsylvania, covering your tax liability for the fiscal year ended October 31, 1928, discloses a deficiency of $865.06.

The recommendations of the Revenue Agent above indicated have been approved by this office after consideration of the protest filed with said agent in connection therewith. If it is Not Your Desire to Protest the determination of your tax liability as set forth in this letter, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:AR:C-5-NOR. The signing of this agreement form will expedite the closing of your return(s) by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas if no Agreement is [fol. 266] Filed, interest will accumulate to the date of assessment of the deficiencies.

If, however, after you have given careful consideration to the proposed adjustments and the accompanying explanations, you desire a hearing in the Unit at Washington, such hearing will be granted you if request is made within thirty days from the date of this letter.

Since it is desired to bring this matter to a satisfactory conclusion as promptly as possible, an early reply to this letter will be appreciated. If no reply is received within the period of time mentioned above, it will be necessary to issue a final notice as required by the provisions of Section 272 of the Revenue Act of 1928, advising you of your privi-

lege to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies. The mailing of this final notice precludes the Income Tax Unit from further discussion of the merits of the case.

Respectfully, David Burnet, Deputy Commissioner, by Assistant Head of Division.

Inclosures: Statement. Form 866. Form 882. MPC-2.

[fol. 267] Statement

IT:AR:C-5.
NOR.

In re: The Real Estate-Land Title and Trust Company,

Broad and Chestnut Streets,

Philadelphia, Pennsylvania

Tax Liability

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
Fiscal year ended October 31, 1928	$313,457.73	$312,592.67	$865.06

Reference is made to the report of the Internal Revenue Agent in Charge, Philadelphia, Pennsylvania, a copy of which has been furnished you, and to your protest executed under date of August 10, 1929.

Careful consideration has been given to your protest in connection with the revenue agent's findings and the report on the conference held on September 17, 1929. The recommendation made by the revenue agent has been approved by this office.

Your contention that depreciation on title plant should be allowed has been denied.

The facts disclose that your company was organized in October, 1927, as the result of the reorganization and merger of the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company. The Real Estate Title Insurance and Trust [fol. 268] Company and the Land Title and Trust Company owned two of the three title abstract plants existing in the

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City of Philadelphia at the time of the reorganization. Each plant was valued at $800,000.00 at that time, although the plant owned by the Real Estate Title Insurance and Trust Company was considered the better of the two. Since only one plant was required it was decided to keep the better one, and to discontinue the use of the plant formerly owned by the Land Title and Trust Company, except for a few maps and other papers that could be readily merged with the records retained.

It is contended that since one plant was abandoned, allowance should be made for the deduction in the amount of $50,000.00, claimed for obsolescence of the title plant abandoned during the taxable year.

Under the provisions of Article 173, Regulations 74, it is provided that when, through some change in business conditions, the usefulness in the business of an asset is suddenly terminated so that the taxpayer discards it permanently from use in such business, a loss may be claimed for the year in which the property was abandoned representing the difference between the cost and the salvage value of the property. Although the title plant was abandoned, it cannot be conceded that a loss was sustained for the reason that it was a valuable asset that could have been sold at a substantial figure had you so desired. It was no doubt recognized that if the plant were permitted to get into the hands of outside interests, it wou-d have materially reduced your income from title searches, since there was only one [fol. 269] other title abstract plant in the city. No loss on account of the abandonment of the plant is, therefore, allowable under the provisions of the regulations referred to herein.

Relative to the allowance of the deduction as a depreciation charge, you are advised that under the provisions of Office Decision (I. T.) 1018, published in Cumulative Bulletin 5, it has been held that a title abstract plant may not be the subject of a depreciation allowance.

In view of the foregoing, your contention is denied.

Net income reported on return	$2,551,776.91
Add:	
1. Depreciation on title plant disallowed	50,000.00
Total	$2,601,776.91
Deduct:	

2. Depreciation not claimed on building, allowed	42,938.27
Adjusted net income	$2,558,838.64

Explanation of Adjustments

1. The deduction claimed for depreciation on title plant has been disallowed since the asset is not a depreciable asset under the provisions of Office Decision (I. T.) 1018, Cumulative Bulletin 5, and Article 202, Regulations 74.

2. The records disclose that no depreciation was claimed on the building taken over from the Land Title and Trust Company. Although it was not used by the new corporation during the year, the depreciation sustained is, nevertheless, [fol. 270] an allowable deduction since the asset constitutes depreciable property owned by the corporation, which is being held until it can be sold or otherwise disposed of. The depreciation allowance has been computed as follows:

Cost of City Center Building to Land Title and Trust Company	$2,146,913.62
Depreciation rate allowed	2%
Depreciation allowed	$ 42,938.27

Allowance has been made under the provisions of Articles 201 and 202 of Regulations 74.

Computation of Tax

Adjusted net income, taxable at 13½% and 12%	$2,558,838.64
Tax at 13½% for 2 months	$ 57,573.87
Tax at 12% for 10 months	255,883.86
Total tax assessable	$ 313,457.73
Tax previously assessed	312,592.67
Deficiency in tax	$ 865.06

A copy of this communication has been mailed to Mr. Joseph A. Lamorelle, 2301 Packard Building, Philadelphia, Pennsylvania, in accordance with the authority conferred upon him in the power of attorney ex-cuted by you and on file with the Bureau.

MCP-2

[fol. 271] EXHIBIT "C"

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to

Jun. 6, 1930.

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

SIRS:

You are advised that the determination of your tax liability for the fiscal year ended October 31, 1928, discloses a deficiency of $865.06, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by [fol. 272] permitting an early assessment of any deficiency and preventing the accumulation of interest charges; since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, Robt. H. Lucas, Commissioner. By David Burnet, Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

Statement

IT:AR:C-5.
NOR-60D.

In re: The Real Estate-Land Title and Trust Company, Broad and Chestnut Streets, Philadelphia, Pennsylvania.

Tax Liability

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
Fiscal year ended October 31, 1928	$313,457.73	$312,592.67	$865.06

[fol. 273] Reference is made to office letter dated March 20, 1930, setting forth the determination of your income tax liability for the taxable year under review, and to the conference held in this office on April 30, 1930, at which the contentions set forth in your protest executed under date of August 10, 1929, were discussed with William S. Johnson, vice president and treasurer of the corporation, and Joseph A. Lamorelle, your authorized representative.

Careful consideration has been accorded your protest in connection with the contentions presented by Mr. Johnson and Mr. Lamorelle at the conference. However, after reviewing all the facts and contentions presented, the previous action taken by this office with respect thereto is sustained.

The issue under controversy is whether a loss on abandonment of a title plant is allowable. You have conceded that there is no basis for the allowance of deductions for amortization, the loss to be recovered over a period of years, but you now contend that allowance should be made for the entire amount of the loss in the year in which the plant was abandoned.

The facts disclose that your company was organized in October, 1927, as the result of the reorganization and merger of the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company. The Real Estate Title Insurance and Trust Company and the Land Title and Trust Company owned two of three title abstract plants existing in the City of Philadelphia at the time of the organization. Each plant was valued at $800,000.00 at that time, although the plant owned

by the Real Estate Title Insurance and Trust Company was [fol. 274] considered the better of the two. Since only one plant was required it was decided to keep the better one, and to discontinue the use of the plant formerly owned by the Land Title and Trust Company, except for a few maps and other papers that could be readily merged with the records retained.

Under the provisions of Article 173, Regulations 74, it is provided that when, through some change in business conditions, the usefulness in the business of an asset is suddenly terminated so that the taxpayer discards it permanently from use in such business, a loss may be claimed for the year in which the property was abandoned representing the difference between the cost and the salvage value of the property. Although the title plant was abandoned, it cannot be conceded that a loss was sustained.

At the time the merger was effected, it was known or should have been known that only one title plant was necessary and would be kept up after the consolidation so that you must have contemplated either abandoning one plant or selling it. Information has been furnished disclosing that a tentative sale price in the amount of $1,000,000.00 was set but no offers were received. It does not appear that any extensive efforts were made to sell the plant. You were apparently satisfied to abandon the plant and therefore there was no involuntary loss but a voluntary one. It is held by this office that the provisions of article 173, Regulations 74, referred to herein, under which allowance may be made for losses due to abandonment of assets, do not apply in the instant case since the abandonment was contemplated before the asset was acquired.

Under article 172, Regulations 74, it is provided that when a taxpayer buys real estate upon which is located a building, [fol. 275] which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

The principal expressed in article 172 is applicable in the instant case, that is to say, where property is acquired with the expectation of voluntarily abandoning certain as-

sets a deductible loss has not been sustained as the result of the abandonment.

In support of your contention that allowance should be made for the loss, you refer to the decision of the District Court in the case of Kansas City Title and Trust Company, 35 Federal 2nd, 351, rendered July 25, 1929 in which case the court held that a deduction, similar to the one you claim, was allowable. You are advised that the case in question is now pending in the Circuit Court of Appeals and therefore the decision rendered by the District Court is not controlling.

In a letter dated May 5, 1930, Mr. Lamorelle has called attention to Office Decision (Income Tax) 1775 published in Comulative Bulletin II-2, page 145, and the decisions of the United States Board of Tax Appeals in the case of American Valve Company, Volume 4, page 1204, and in the case of Belle Isle Creamery Company, Volume 14, page 737.

It is the opinion of this office that the Office Decision referred to is not applicable since in your case, there was no intention to continue both title plants. In the case covered [fol. 276] by the Office Decision an abstract plant was purchased and at the time of purchase it was thought it could be used to advantage in the abstract and title guaranty work of the taxpayer but it was found upon trial to be inefficient. It was then decided not to continue additions thereto from day to day to keep it up-to-date. It will be noted that the taxpayer, at the time of purchase, intended to use the plant in the business, whereas in your case, at the time of purchase it was known that only one plant could be used. It is believed that this important difference renders the ruling, laid down in the Office Decision referred to herein, inapplicable.

With respect to the decision of the United States Board of Tax Appeals in the case of the American Valve Company, the facts in that case disclose that in 1917, due to changes in business conditions, it became necessary for the taxpayer to acquire a new site and erect new buildings. In June, 1920, the taxpayer began operating the new plant. The taxpayer was permitted to take deductions for obsolescence over the years 1918, 1919, and the first six months in 1920. The facts disclose that the assets on which deductions for obsolescence were allowed had been used by the taxpayer over a period of years, and due to changes in business conditions it was known that the facilities were obsolete and

would have to be abandoned. In your case, however, the asset was acquired with the knowledge that it would have to be abandoned if it could not be sold. The decision is therefore not applicable, since the facts on which it was predicated are materially difference from the facts in your case.

Likewise, the facts in the case of the Belle Isle Creamery [fol. 277] Company are not sufficiently similar to the facts in your case to make the decision of the Board applicable.

There is therefore no basis on which your contention may be allowed and it is accordingly denied.

Net income reported on return	$2,551,776.91
Add:	
1. Depreciation on title plant disallowed	50,000.00
Total	$2,601,776.91
Deduct:	
2. Depreciation not claimed on building allowed	42,938.27
Adjusted net income	$2,558,838.64

Explanation of Adjustments

1. The deduction claimed for depreciation on title plant has been disallowed since the asset is not a depreciable asset under the provisions of Office Decision (Income Tax) 1018, Cumulative Bulletin 5, and article 202, Regulations 74.

2. The records disclose that no depreciation was claimed on the building taken over from the Land Title and Trust Company. Although it was not used by the new corporation during the year, the depreciation sustained is, nevertheless, an allowable deduction since the asset constitutes depreciable property owned by the corporation, which is being held until it can be sold or otherwise disposed of. The depreciation allowance has been computed as follows:

[fol. 278] Cost of City Center Building to Land Title and Trust Company	$2,146,913.62
Depreciation rate allowed	2%
Depreciation allowed	$ 42,938.27

Allowance has been made under the provisions of articles 201 and 202 of Regulations 74.

Computation of Tax

Adjusted net income, taxable at 13½% and 12%	$2,558,838.64
Tax at 13½% for 2 months	$ 57,573.87
Tax at 12% for 10 months	255,883.86
Total tax assessable	$ 313,457.73
Tax previously assessed	312,592.67
Deficiency in tax	$ 865.06

A copy of this communication has been mailed to Mr. Joseph A. Lamorelle, 2301 Packard Building, Philadelphia, Pennsylvania, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

Exhibit "D"

Agreement of consolidation and merger made this Third day of October, 1927, by and between The Real Estate Title Insurance and Trust Company of Philadelphia, a corporation organized and existing under and by virture of the laws of the State of Pennsylvania, and the undersigned [fol. 279] Directors of The Real Estate Title Insurance and Trust Company of Philadelphia, being a majority of the entire Board of Directors thereof, (parties of the first part); West End Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and the undersigned Directors of the West End Trust Company, being a majority of the entire Board of Directors thereof, (parties of the second part); and The Land Title and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and the undersigned Directors of The Land Title and Trust Company, being a majority of the entire Board of Directors thereof, (parties of the third part); Witnesseth:—

Whereas, The Real Estate Title Insurance and Trust Company of Philadelphia is a corporation having its principal office in the City of Philadelphia, State of Pennsylvania, incorporated and organized as The Real Estate Title Insurance Company of Philadelphia under the provisions of an Act of the General Assembly of Pennsylvania, ap-

proved the 29th day of April, A. D. 1874, entitled "An Act to provide for the incorporation, and regulation of certain corporations," and the several supplements thereto, and existing by virtue of Letters Patent issued by the Governor of the said Commonwealth under the great seal of the State, on the 28th day of March, 1876, for the purpose of insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and other incumbrances, and for that purpose to have and enjoy all the powers and privileges conferred upon com- [fol. 280] panies by said Acts of Assembly and the various supplements thereto.

And Whereas, by virtue of Letters Patent issued by the Governor of the said Commonwealth under the great seal of the State on the 3rd day of December, 1881, the said Charter of The Real Estate Title Insurance Company of Philadelphia was amended by changing the name thereof to The Real Estate Title Insurance and Trust Company of Philadelphia.

And Whereas, The Real Estate Title Insurance and Trust Company of Philadelphia has a capital stock of $2,000,000 divided into 20,000 shares of a par value of $100 each, all issued and outstanding.

And Whereas, West End Trust Company is a corporation having its principal office in the City of Philadelphia, State of Pennsylvania, incorporated and organized as West End Trust & Safe Deposit Co. under the provisions of an Act of the General Assembly of Pennsylvania, approved the 29th day of April, A. D. 1874, entitled "An Act to provide for the incorporation and regulation of certain corporations," and the several supplements thereto, and existing by virtue of Letters Patent issued by the Governor of the said Commonwealth under the great seal of the State, on the 24th day of February, 1891, for the purpose of insurance of owners of real estate, mortgagees, and others interested in real estate, from loss by reason of defective titles, liens and other incumbrances, and for that purpose to have and enjoy all the powers and privileges conferred upon companies by said Act of Assembly and the various supplements thereto.

And Whereas, by virtue of Letters Patent issued by the Governor of the said Commonwealth under the great seal [fol. 281] of the State on the 20th day of November, 1891, the said Charter of the West End Trust & Safe Deposit Co. was amended by changing the name thereof to West End Trust Company.

And Whereas, West End Trust Company has a capital stock of $2,000,000 divided into 20,000 shares of a par value of $100 each, all issued and outstanding.

And Whereas, The Land Title and Trust Company is a corporation having its principal office in the City of Philadelphia, State of Pennsylvania, incorporated and organized under the provisions of an Act of the General Assembly of Pennsylvania, approved the 29th day of April, A. D. 1874, entitled "An Act to provide for the incorporation and regulation of certain corporations," and the several supplements thereto, and existing by virtue of Letters Patent issued by the Governor of the said Commonwealth under the great seal of the State, on the 26th day of August, 1885, for the purpose of insurance of owners of real estate, mortgagees, and others interested in real estate, from loss by reason of defective titles, liens and other incumbrances, and for that purpose to have and enjoy all the powers and privileges conferred upon companies by said Act of Assembly and the various supplements thereto.

And Whereas, The Land Title and Trust Company has a capital stock of $3,000,000 divided into 30,000 shares of a par value of $100 each, all issued and outstanding.

And Whereas, it is the desire of said corporations and their respective Directors, parties hereto as expressed by the resolutions of the Directors of each of said corporations at meetings regularly called and held, to merge the corpo- [fol. 282] rate rights, franchises, powers and privileges of West End Trust Company, The Real Estate Title Insurance and Trust Company of Philadelphia, and The Land Title and Trust Company, with each other and into The Real Estate-Land Title and Trust Company, under and by virtue of the Act of the General Assembly of the Commonwealth of Pennsylvania entitled "An Act authorizing the merger and consolidation of certain corporations," approved the 3rd day of May, A. D. 1909, and its supplements, so that by virtue thereof such corporations may be consolidated, and that all the property, rights, franchises and privileges then by law vested in each of said corporations, shall be transferred and vested in The Real Estate-Land Title and Trust Company.

Now This Agreement Witnesseth:—

That The Real Estate Title Insurance and Trust Company of Philadelphia and its Directors, parties of the first part; West End Trust Company and its Directors, parties of the second part; and The Land Title and Trust Company

and its Directors, parties of the third part, in consideration of the premises and of the mutual performance of the covenants thereof, do hereby agree that upon the due approval of this agreement by the holders of a majority in amount of the entire capital stock of each of said corporations, at special meetings of the Stockholders thereof, duly called and held for that purpose, the filing of certificates thereof, and a copy of this agreement in the office of the Secretary of the Commonwealth, and the issue of Letters Patent thereon by the Governor, the said merger shall be deemed to have taken place, and the said corporations, parties hereto, shall be one [fol. 283] corporation under the name adopted in and by this agreement, possessing all and singular the rights, privileges and franchises vested in each of them, and all estate and property, real and personal, and the rights of action of each of said corporations, parties hereto, shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title and Trust Company, without any further act or deed; Provided that all rights of creditors and all liens on the property of each of said corporations, parties hereto, shall continue unimpaired, and the respective constituent corporations shall be deemed to be in existence to preserve the same, and all debts, duties and liabilities of each of the said constituent corporations shall thenceforth attach to the said new corporation and may be enforced against it to the same extent and by the same process as if the said debts, duties and liabilities had been contracted by it, the said The Real Estate-Land Title and Trust Company.

Said merger and consolidation shall be upon the following terms and conditions:—

First. The name of the corporation shall be The Real Estate-Land Title and Trust Company.

Second. The Board of Directors of the corporation shall consist of not more than forty-eight (48) Directors, of whom a majority in attendance at any meeting shall constitute a quorum.

The Directors shall be annually elected at the annual meetings of the Stockholders, to be held at the principal office of the Company in the City of Philadelphia on the third Monday of November, in each year. The first annual meeting shall be held on the third Monday of November, 1928.

The Board of Directors shall presently consist of forty-[fol. 284] eight (48) Directors, who are hereinafter named,

and who shall serve for one year from the effective date of the merger or until their successors are elected.

The Board of Directors shall, at their first meeting after the effective date of merger, have power to adopt a set of By-Laws for the merged company.

The names and the residences of those who are to be the first Directors and Officers of the corporation are as follows:—

Directors	Residence
C. Herbert Bell	Devon, Pa.
Edward H. Bonsall	Glenolden, Del. Co., Pa.
John W. Brock	1417 Spruce St., Phila.
Robert M. Coyle	Rittenhouse-Plaza, Phila.
Edgar G. Cross	Montgomery Ave. & Byrn Mawr Ave., Cynwyd, Pa.
Cyrus H. K. Curtis	Wyncote, Pa.
Henry M. DuBois	1108 S. 46th St., Phila.
George W. Elkins	Elkins Park, Pa.
William M. Elkins	Elkins Park, Pa.
Christian C. Fobiger	3421 Powelton Ave., Phila.
George H. Frazier	Jenkintown, Pa.
Percival E. Foerderer	Merion, Pa.
Samuel M. Freeman	443 W. Price St., Germantown
Eugene W. Fry	Rydal, Pa.
John D. Johnson	Highland Ave., Merion, Pa.
Francis A. Lewis	2207 St. James Place, Phila.
Francis A. Lewis, 3rd	2032 Spruce St., Phila.
John C. Lowry	1900 Rittenhouse Sq., Phila.
Benjamin H. Ludlow	Ardmore, Pa.
John C. Martin	Wyncote, Pa.

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W. W. Montgomery, Jr.	Radnor, Pa.
Frank H. Moss	Bala, Pa.
George McCall	Touraine Apts., Phila.
William L. Nevin	329 S. 16th St., Phila.
C. S. Newhall	Midvale Ave. & Stokely St., Phila.
William R. Nicholson	2415 Bryn Mawr Ave., Phila.
Ralph H. North	7301 Boyer St., Mt. Airy, Pa. *Phila.*
C. S. W. Packard	1850 S. Rittenhouse Sq., Phila.
Charles T. Quin	261 W. Walnut Lane, Germantown
Joseph T. Richards	Rittenhouse-Plaza, Phila.

Directors	Residence
Walter A. Rigg	Reading, Pa.
G. Brinton Roberts	Bala, Pa.
Isaac W. Roberts	Bala, Pa.
Owen J. Roberts	1827 DeLancey St., Phila.
James S. Rogers	Haverford, Pa.
Thomas Shallcross, Jr.	Hazelhurst & Forest Rds., Merion, Pa.
Samuel S. Sharp	239 W. Johnson St., Phila.
William H. Shelmerdine	269 W. Walnut Lane, Germantown
J. Willison Smith	511 S. 48th St., Phila.
Howard A. Stevenson	200 W. Tulpehocken St., Germantown
A. Morritt Taylor	Wayne, Pa.
Charles W. Welsh	Garden Court Apts., Phila.
William B. Whelen	Touraine Apts., Phila.
Thomas Raeburn White	1807 DeLancey St., Phila.
Joseph E. Widener	Lynnewood Hall, Elkins Park, Pa.

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George D. Widener	White Marsh, Pa.
George Wilcox	Springfield, Pa.
William Wood	Wayne, Del. Co., Pa.

Officers	Residence
J. Willison Smith, President	511 S. 48th St., Phila.
Edward H. Bonsall, Vice-President	Glenolden, Del. Co., Pa.
Oakley Cowdrick, Vice-President	Hotel Colonial, Phila.
Lewis P. Geiger, Vice-President	365 W. Johnson St., Phila.
Daniel Houseman, Vice-President	Cynwyd, Pa.
Antrim H. Jones, Vice-President	Elkins Park, Pa.
Claude A. Simpler, Vice-President	The Wellington, 19th & Walnut St., Phila.
Samuel L. Hayes, Secretary	Norwood, Pa.
William S. Johnson, Treasurer	1219 Foulkrod St., Phila.

Officers	Residence
John M. Strong, Trust Officer	5937 Overbrook Ave., Phila.
A. King Dickson, Trust Officer	4003 Woodland Ave., Phila.
Peirce Mecutchen, Title Officer	4942 N. Broad St., Phila.
S. Eugene Kuen, Title Officer	Cynwyd, Pa.
William McKee, Jr., Manager of Title Department	Ardmore, Pa.

[fol. 287] Third: The capital stock of the corporation shall be $7,500,000 and shall be divided into 75,000 shares of a par value of $100 each, and one share of the par value of $100 each of the corporation shall be issued in exchange for one share of stock of the par value of $100 each of The Real Estate Title Insurance and Trust Company of Philadelphia, one share of stock of the par value of $100 each of the corporation shall be issued in exchange for one share of the par value of $100 each of West End Trust Company, and one and one-sixth shares of stock of the par value of $100 each of the corporation shall be issued in exchange for one share of stock of the par value of $100 each of The Land Title and Trust Company.

Pending the engraving of final certificates, temporary certificates of stock or negotiable receipts may be issued, exchangeable for definitive certificates of stock.

Fourth: Inasmuch as the property of the West End Trust Company at the South-west corner of Broad Street and South Penn Square, Philadelphia, Pa., has, for the purpose of this agreement, been valued at $1,750,000, it is understood and agreed that any price received by the corporation in excess of $1,750,000 shall be held by the merged corporation for the benefit of and distributed to the stockholders of the West End Trust Company of record on the 31st day of October, 1927, in the amounts, in accordance with, and subject only to the rights herein set forth, to wit:—

Each Stockholder of the West End Trust Company of record on the 31st day of October, 1927, shall be entitled as, if and when declared by the Board of Directors of the [fol. 288] merged corporation, to his proportionate part of

such amount as, in the uncontrolled discretion of the Board of Directors of the merged corporation, is determined by said Board to be the net amount of the excess received by the merged corporation upon the sale of the property located at the South-west corner of Broad Street and South Penn Square, Philadelphia, Pa., over and above the figure of $1,750,000, the value placed thereon for the purposes of this agreement of merger, after deduction of all costs, charges and expenses as may, in the uncontrolled discretion of the said Board, be properly chargeable to the proceeds of said sale.

No Stockholder of the West End Trust Company, his legal representatives, successors or assigns, shall have any right, claim or demand in, to or against the said property located at the South-west corner of Broad Street and South Penn Square, Philadelphia, Pa., nor shall any such Stockholder, his legal representatives, successors or assigns, have any right of action, claim or demand in law or in equity, for an accounting or otherwise, against the merged corporation, all of which rights, claims, and demands are, by the approval of this agreement of merger and the acceptance of a new certificate of stock in the merged corporation, expressly waived by such Stockholder for himself, his legal representatives, successors and assigns.

The right of each Stockholder of the West End Trust Company is limited to the right conferred by this agreement of merger and such right is hereby limited to the receipt of such amount as, in the uncontrolled discretion of the Board of Directors of the merged corporation, may be determined by said Board upon the sale of said property located at the [fol. 289] South-west corner of Broad Street and South Penn Square, Philadelphia, Pa., to be the amount to which such Stockholder is entitled.

Payment of such amount as may be determined as aforesaid to the Stockholders of the West End Trust Company of record on the 31st day of October, 1927, or to their legal representatives, successors or assigns, shall be a full acquittance and discharge to the merged corporation of all rights hereunder.

Fifth: Inasmuch as the real estate of The Land Title and Trust Company, situated on the South-west corner of Broad and Chestnut Streets, and the North-west corner of Broad and Sanson Streets, Philadelphia, has, for the purpose of

this agreement, been eliminated, it is understood and agreed that before the merger herein contemplated becomes effective, the Land Title and Trust Company shall have the right to convey said real estate now carried on its books at $7,-050,000, to a Building Corporation to be formed to take title to said real estate and to distribute to and among its Stockholders in such manner as it may be advised by counsel, all of its interest in said corporation represented by stock or otherwise, so that when the merger herein contemplated becomes effective, the said real estate shall not be an asset of the merged corporation.

And This Agreement Further Witnesseth:—

That the said parties hereto do hereby mutually covenant and agree that those present shall be submitted in the manner prescribed by law to the Stockholders of each of said [fol. 290] corporations for the adoption or rejection of the same, in pursuance and conformity with the Act of Assembly in such case made and provided, and in case of the adoption thereof by the majority in amount of the Stockholders of each of the said corporations, to cause the same to be duly certified by the Secretaries thereof under the corporate seal thereof, in accordance with law, and to cause a certified copy of this agreement together with a certificate of said Secretaries to be duly filed, and these Presents thenceforth shall be deemed and taken to be the act and agreement of consolidation and merger of said corporations, parties hereto.

And the said parties hereto do mutually covenant and agree each with the other, for the purpose of said consolidation and merger, that the said parties will respectively do and perform all things necessary to carry into effect the terms and conditions of this agreement, and to vest in the new corporation all and singular the rights, privileges and franchises now vested in each of them, and all estate and property, real and personal, and rights of action of each of them.

In Witness Whereof, the said corporations, parties hereto, have caused their respective corporate seals to be hereto affixed, duly attested, and these Presents to be signed by the respective Presidents and Secretaries, and the said several Directors of said respective corporations, parties hereto, have hereunto set their hands and seal the day and year first above written.

[fol. 291] Signed, Sealed and Delivered in the presence of:

	The Real Estate Title Insurance and Trust Company of Philadelphia, by Francis A. Lewis, President
Witness as to all Directors,	Attest: L. W. Cowning, Secretary. (Seal.)
L. W. Cowning.	Francis A. Lewis
C. T. Q.	Charles T. Quin
F. A. L., 3	Francis A. Lewis, 3rd
O. J. R.	Owen J. Roberts
I. W. R.	Isaac W. Roberts
S. M. F.	Samuel M. Freeman
H. M. DuB.	Henry M. DuBois
C. S. W. P.	C. S. W. Packard
W. H. S.	W. H. Shelmerdine
H. A. S.	Howard A. Stevenson
W. A. R.	Walter A. Rigg
G. H. F.	George H. Frazier
C. W. W.	C. W. Welsh
G. McC.	Geo. McCall
W. W.	William Wood
F. H. M.	

Directors.

	West End Trust Company, by J. Willison Smith, President
	Attest: Samuel L. Hayes, Secretary. (Seal.)
[fol. 292] S. L. H.	Hayes, Secretary. (Seal.)
C. H. B.	C. Herbert Bell
R. M. C.	Robert M. Coyle
C. C. F.	Christian C. Febiger
J. D. J.	J. D. Johnson
J. C. L.	John C. Lowry
B. H. L.	Benjamin H. Ludlow
W. W. M., Jr.	W. W. Montgomery, Jr.
Witness as to all Directors, Samuel L. Hayes, Sec.	
W. L. N.	W. L. Nevin
J. T. R.	Joseph T. Richards
G. B. R.	G. Brinton Roberts

J. S. R.	James S. Rogers
	J. Willison Smith
A. M. T.	A. M. Taylor
T. R. W.	T. R. White
W. B. W.	Wm. B. Whelen
G. W.	George Wilcox
	Directors.

The Land Title & Trust Company,
by Wm. R. Nicholson, President.
Attest: L. A. Davis, Secretary.
(Seal.)

Witness as to all Directors,	Wm. R. Nicholson
[fol. 293]	Edw. H. Bonsall
L. A. Davis	Ralph H. North
	Percival E. Foerderer
	John C. Martin
	Cyrus H. K. Curtis
	George W. Elkins
	Tho. Shallcross, Jr.
	John W. Brock
	George D. Widener
	Joseph E. Widener
	Edgar G. Cross
	Wm. Elkins
E. W. F.	E. W. Fry

Commonwealth of Pennsylvania,
County of Philadelphia:

On this 3rd day of October, 1927 personally appeared before me, a Notary Public of the Commonwealth of Pennsylvania, residing at Philadelphia, Francis A. Lewis, Charles T. Quin, Francis A. Lewis, 3rd, Owen J. Roberts, Isaac W. Roberts, Samuel M. Freeman, Henry M. Du Bois, C. S. W. Packard, William H. Shelmerdine, Howard A. Stevenson, Walter A. Rigg, George H. Frazier, C. W. Welsh, George McCall, William Wood, Directors of Real Estate Title Insurance & Trust Co., who acknowledged the above agreement of consolidation and merger to be their and each of their act and deed as Directors of said Real Estate Title Insurance & Trust Co., and the act and deed of the said Company, and desired the same to be recorded as such.

[fol. 294] Witness my hand and notarial seal the day and year aforesaid.

John B. Henkels, Notary Public.

Commission expires January 15th, 1929.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

John B. Henkels, Notary Public.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia; ss:

LeFevre W. Downing being duly sworn according to law, doth depose and say that he is the Secretary of The Real Estate Title Insurance & Trust Co.; that the books and records of said Company are in his custody and under his control; that the persons whose signatures are attached to the above agreement of merger and consolidation as Directors of said The Real Estate Title Insurance & Trust Co. are in fact a majority in number of all the Directors of the said corporation, and that the signatures of the said agreement of merger and consolidation are genuine and in the proper handwriting of the subscribers; that he was personally present at the execution of said agreement of merger and consolidation and saw the corporate seal of the said corporation affixed thereto, and that the seal so affixed is the common [fol. 295] or corporate seal of the said corporation.

L. W. Cowning, LeFevre W. Cowning.

Sworn to and subscribed before me this 3rd day of October, 1927. John B. Henkels, Notary Public. Commission expires January 15th, 1929. (Seal.)

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

John B. Henkels, Notary Public.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia; ss:

On the 3rd day of October, 1927, personally appeared before me, a Notary Public of the Commonwealth of Pennsylvania, residing at Philadelphia, C. Herbert Bell, Robert

M. Coyle, Christian C. Febiger, John D. Johnson, John C. Lowry, Benjamin H. Ludlow, W. W. Montgomery, Jr., Wm. L. Nevin, Joseph T. Richards, G. Brinton Roberts, James S. Rogers, J. Willison Smith, A. M. Taylor, T. R. White, Wm. B. Whelen and George Wilcox, Directors of West End Trust Company, who acknowledged the above agreement of consolidation and merger to be their and each of their act and deed as Directors of said West End Trust Company, [fol. 296] and the act and deed of the said corporation, and desired the same be recorded as such.

Witness my hand and notarial seal the day and year aforesaid. Edward W. Bell, Notary Public. (Seal.) Commission expires 3-6-1931.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

Edward W. Bell.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia; ss:

Samuel L. Hayes being duly sworn according to law, doth depose and say, that he is Secretary of West End Trust Company; that the books and records of said corporation are in his custody and under his control; that the persons whose signatures are attached to the above agreement of merger and consolidation as Directors of said West End Trust Company are in fact a majority in number of all the Directors of the said corporation, and that the signatures of the said agreement of merger and consolidation are genuine and in the proper handwriting of the subscribers; that he was personally present at the execution of said agreement of merger and consolidation and saw the corporate seal of [fol. 297] the said corporation affixed thereto, and that the seal so affixed is the common or corporate seal of said corporation.

Samuel L. Hayes.

Sworn to and subscribed before me this 3d day of October, 1927. Edward W. Bell, Notary Public. (Seal.) Commission expires 3-6-1931.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

Edward W. Bell.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia; ss:

On the third day of October, 1927, personally appeared before me, a Notary Public of the Commonwealth of Pennsylvania, residing at Philadelphia, the above named William R. Nicholson, Edward H. Bonsall, Ralph H. North, Percival E. Foerderer, John C. Martin, Cyrus H. K. Curtis, George W. Elkins, Thomas Shallcross, Jr., John W. Brock, George D. Widener, Joseph E. Widener, Edgar G. Cross, William M. Elkins, Eugene W. Fry, Directors of The Land Title & Trust Company, who acknowledged the above agreement [fol. 298] of consolidation and merger to be their and each of their act and deed as Directors of the said The Land Title & Trust Company, and the act and deed of the said corporation, and desired the same to be recorded as such.

Witness my hand and notarial seal the day and year aforesaid. Samuel Earley, Notary Public. (Seal.) Commission expires, March 24, 1929.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

Samuel Earley.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia; ss:

Louis A. Davis being duly sworn according to law, doth depose and say that he is the Secretary of The Land Title & Trust Company; that the books and, records of said Company are in his custody and under his control; that the persons whose signatures are attached to the above agreement of merger and consolidation as Directors of said The Land Title & Trust Company are in fact a majority in number of all the Directors of the said corporation, and that the signatures of the said agreement of merger and consolidation are genuine and in the proper handwriting of the subscribers; that he was personally present at the execution of [fol. 299] said agreement of merger and consolidation and saw the corporate seal of the said corporation affixed thereto, and that the seal so affixed is the common or corporate seal of the said corporation.

L. A. Davis.

Sworn to and subscribed before me this 3d day of October, 1927. Samuel Earley, Notary Public. Commission expires, March 24, 1929.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

Samuel Earley.

I, L. W. Cowning, Secretary of The Real Estate Title Insurance & Trust Co., do hereby certify that at a special meeting of the Stockholders of said Company held at the office of the Company on the 24th day of October, 1927, for the purpose of voting upon the proposed merger of The Real Estate Title Insurance & Trust Co., West End Trust Company and The Land Title & Trust Company with each other and into The Real Estate-Land Title & Trust Company, after due notice of the place and object of said meeting had been given by publication as required by law, an election by ballot was held for the adoption or rejection by the said Stockholders of an agreement of merger and consolidation of said The Real Estate Title Insurance & Trust Company, West End Trust Company, and The Land Title & Trust Com- [fol. 300] pany with each other and into The Real Estate-Land Title & Trust Company, made by and between said Companies and the Board of Directors thereof, and that at said election a majority of the entire capital stock of said corporation was voted in favor of said agreement of merger and consolidation, of which the foregoing is a true copy.

In witness whereof, I have hereunto set my hand as Secretary of the corporation and have hereto affixed the corporate seal thereof, this 24th day of October, 1927. L. W. Cowning, Secretary. (Seal.)

I, Samuel L. Hayes, Secretary of West End Trust Company, do hereby certify that at a special meeting of the Stockholders of said Company held at the office of the Company on the 24 day of October, 1927, for the purpose of voting upon the proposed merger of The Real Estate Title Insurance & Trust Co., West End Trust Company and The Land Title & Trust Company, with each other and into The Real Estate-Land Title & Trust Company, after due notice of the place and object of said meeting had been given by publication as required by law, an election by ballot was held for the adoption or rejection by the said Stockholders of an agreement of merger and consolidation of said The Real Estate Title Insurance & Trust Company, West End Trust Company, and The Land Title & Trust Company with each other and into The Real Estate-Land Title & Trust Com-

pany, made by and between said Companies and the Board of Directors thereof, and that at said election a majority [fol. 301] of the entire capital stock of said corporation was voted in favor of said agreement of merger and consolidation, of which the foregoing is a true copy.

In Witness Whereof, I have hereunto set my hand as Secretary of the Corporation and have hereto affixed the corporate seal thereof, this 24 day of October, 1927. Samuel L. Hayes, Secretary. (Seal)

I, L. A. Davis, Secretary of The Land Title & Trust Company, do hereby certify that at a special meeting of the Stockholders of said Company held at the office of the Company on the 24th day of October, 1927, for the purpose of voting upon the proposed merger of The Real Estate Title Insurance & Trust Co., West End Trust Company and The Land Title & Trust Company, with each other and into The Real Estate-Land Title & Trust Company, after due notice of the place and object of said meeting had been given by publication as required by law, an election by ballot was held for the adoption or rejection by the said Stockholders of an agreement of merger and consolidation of said The Real Estate Title Insurance & Trust Company, West End Trust Company, and The Land Title & Trust Company with each other and into The Real Estate-Land Title & Trust Company, made by and between said Companies and the Board of Directors thereof, and that at said [fol. 302] election a majority of the entire capital stock of said corporation was voted in favor of said agreement of merger and consolidation of which the foregoing is a true copy.

In Witness Whereof, I have hereunto set my hand as Secretary of the Corporation and have hereto affixed the corporate seal thereof, this 24th day of October, 1927.

L. A. Davis, Secretary.

Office of
The Real Estate Title Insurance and Trust Company
Philadelphia, Pa.

October 24, 1927

I hereby certify that the following Resolution was adopted at a meeting of the Board of Directors of this Company held on the Third day of October, A. D. 1927, viz:

"Further Resolved that a special meeting of the Stockholders of this Company be called for Monday, October 24, 1927, at the office of the Company, Philadelphia, Pa., at 11 o'clock A. M. for the purpose of voting upon the adoption or rejection of the said agreement for merger and consolidation between The Real Estate Title Insurance & Trust Company, West End Trust Company and The Land Title and Trust Company."

[fol. 303] I further certify that due advertisement of said meeting, as required by law, was made in the Public Ledger and the Philadelphia Record, two newspapers in the County of Philadelphia in which the principal office of The Real Estate Title Insurance and Trust Company is situate, on Friday, October 7th, 14th, and 21st, 1927, and in the Legal Intelligencer, a legal newspaper published in said County, on Friday, October 7th, 14th and 21st, 1927.

L. W. Cowning, Secretary. (Seal.)

Office of
West End Trust Company
Philadelphia, Pa.

October 24, 1927

I hereby certify that the following Resolution was adopted at a meeting of the Board of Directors of this Company held on the Third Day of October, A. D. 1927, viz:

"Further Resolved that a special meeting of the Stockholders of this Company be called for Monday, October 24, 1927, at the office of the Company, Philadelphia, Pa., at 12 o'clock noon, for the purpose of voting upon the adoption or rejection of the said agreement for merger and consolidation between The Real Estate Title Insurance and Trust [fol. 304] Company, West End Trust Company and The Land Title and Trust Company."

I further certify that due advertisement of said meeting as required by law, was made in the Public Ledger and the Philadelphia Record, two newspapers in the County of Philadelphia in which the principal office of the West End Trust Company is situate, on Friday, October 7th, 14th, and 21st, 1927, and in the Legal Intelligencer, a legal newspaper published in said County, on Friday, October 7th, 14th, and 21st, 1927, and also in compliance with the By-Laws of the Company, in the Evening Ledger on October 17th, 1927, in

the Evening Bulletin on October 17th, 18th, 19th, 20th, 21st and 22nd, 1927, and in the Public Ledger on October 18th, 19th, 20th, 21st, 22nd and 24th, 1927.

Samuel L. Hayes, Secretary.

Office of
The Land Title and Trust Company
Philadelphia, Pa.

October 24, 1927.

I hereby certify that the following Resolution was adopted at a meeting of the Board of Directors of this Company held on the Third day of October, A. D. 1927, viz:

"Resolved further that a special meeting of the Stockholders of this Company be called for Monday, October 24, [fol. 305] 1927, at the office of the Company in Philadelphia, Pennsylvania, at 10 A. M. o'clock, for the purpose of voting upon the adoption or rejection of the said Agreement for merger and consolidation between The Real Estate Title Insurance and Trust Company, West End Trust Company and The Land Title and Trust Company."

I further certify that due advertisement of said meeting, as required by law, was made in the Public Ledger and the Philadelphia Record, two newspapers in the County of Philadelphia in which the principal office of The Land Title and Trust Company is situate, on Friday, October 7th, 14th, and 21st, 1927, and in the Legal Intelligencer, a legal newspaper published in said County on Friday, October 7th, 14th, and 21st, 1927.

L. A. Davis, Secretary.

The Real Estate Title Insurance and Trust Company

Oath of Judges

State of Pennsylvania,
County of Philadelphia, ss:

On this Twenty-fourth day of October, A. D. 1927, before me, a Notary Public in and for said State, residing in said County, personally appeared B. Griffith Jones, Carroll R. [fol. 306] Williams and Joseph H. Jolley, who, being duly sworn according to law, did depose and say that they are the judges appointed by the Board of Directors of The Real

Estate Title Insurance and Trust Company to conduct an election for the merger and consolidation of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and West End Trust Company, to be held on the 24th day of October, A. D. 1927, and that they will well and truly, according to law, conduct such election to the best of their ability and true return make of the same.

B. Griffith Jones, Carroll R. Williams, Joseph H. Jolley.

Sworn to and Subscribed before me the day and year aforesaid. John B. Henkels, Notary Public.

Comm. expires January 15/29.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

John B. Henkels, Notary Public.

[fol. 307] West End Trust Company

Oath of Judges

State of Pennsylvania,
County of Philadelphia, ss:

On this Twenty-fourth day of October, A. D. 1927, before me, a Notary Public in and for said State, residing in said County, personally appeared Frank P. Felton, Augustus Trask Ashton and Samuel T. Hall, who, being duly sworn according to law, did depose and say that they are the judges appointed by the Board of Directors of West End Trust Company to conduct an election for the merger and consolidation of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and West End Trust Company, to be held on the 24th day of October, A. D. 1927, and that they will well and truly, according to law, conduct such election to the best of their ability and true return make of the same.

Frank P. Felton, Augustus Trask Ashton, Samuel T. Hall.

Sworn to and subscribed before me the day and year aforesaid. Edward W. Stille, Notary Public. (Seal.)

My commission expires March 6th, 1931.

I hereby certify that I am not a Stockholder, Director [fol. 308] or Officer of the within named Trust Company.

Edward W. Stille.

THE LAND TITLE AND TRUST COMPANY

OATH OF JUDGES

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this Twenty-fourth day of October, A. D. 1927, before me, a Notary Public in and for said State, residing in said County, personally appeared William P. Scott, Samuel C. Edmunds and Charles L. Gilliand, who, being duly sworn according to law, did depose and say that they are the judges appointed by the Board of Directors of The Land Title and Trust Company to conduct an election for the merger and consolidation of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and West End Trust Company, to be held on the 24th day of October, A. D. 1927, and that they will well and truly, according to law, conduct such election to the best of their ability and true return make of the same.

W. P. Scott, Samuel C. Edmunds, C. L. Gilliand.

[fol. 309] Sworn to and subscribed before me the day and year aforesaid. Chas. R. Bowen, Notary Public. (Seal.)

Commission expires end of next Session of Senate.

I hereby certify that I am not a Stockholder, Director or Officer of the within named Trust Company.

Chas. R. Bowen.

OFFICE OF THE REAL ESTATE TITLE INSURANCE AND TRUST COMPANY

October 24, 1927

RETURN OF JUDGES

We, the undersigned, judges appointed by the Board of Directors of The Real Estate Title Insurance and Trust

Company to conduct an election for the adoption or rejection of an agreement for the merger and consolidation of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company, and West End Trust Company, do respectfully return:

That a meeting of the Stockholders of The Real Estate Title Insurance and Trust Company was this day held at the Company's office at Philadelphia, Pennsylvania, and that in pursuance of our above subscribed oaths we did [fol. 310] conduct such an election; that at the time of holding such election the outstanding capital stock of the Company, as shown by the sworn return furnished us by the Secretary of the Company, consisted of 20,000 shares; that there was offered at said meeting the following Resolution, viz:

"Resolved that the Stockholders of this Company hereby adopt and approve the Agreement of Merger entered into under date of October 3, 1927, by and between the Directors of The Real Estate Title Insurance and Trust Company of Philadelphia, West End Trust Company and The Land Title and Trust Company."

That we thereupon proceeded to hold an election for or against the adoption of said Resolution; that upon counting the votes at the close of the election we found that 19,979 shares had been voted in favor of the adoption of said Resolution and no shares had been voted against the adoption of said Resolution; and it appearing that a majority of the shares of the capital stock of the Company had been voted in favor thereof, we do hereby declare and return that the said Resolution has been adopted and ratified and confirmed.

Witness our hands and seals this twenty-fourth day of October, A. D. 1927.

B. Griffith Jones (Seal), Carroll R. Williams (Seal), Joseph H. Jolley (Seal).

[fol. 311] Office of West End Trust Company

October 24, 1927

Return of Judges

We, the undersigned, judges appointed by the Board of Directors of West End Trust Company to conduct an elec-

tion for the adoption or rejection of an agreement for the merger and consolidation of The Land Title and Trust Company, The Real Estate Title Insurance and Trust Company and West End Trust Company, do respectfully return:

That a meeting of the Stockholders of West End Trust Company was this day held at the Company's office at Philadelphia, Pennsylvania, and that in pursuance of our above subscribed oaths we did conduct such an election; that at the time of holding such election the outstanding capital stock of the Company, as shown by the sworn return furnished us by the Secretary of the Company, consisted of 20,000 shares; that there was offered at said meeting the following Resolution, viz:

"Resolved that the Stockholders of this Company hereby adopt and approve the Agreement of Merger entered into under date of October 3, 1927, by and between the Directors of The Real Estate Title Insurance and Trust Company of Philadelphia, West End Trust Company and The Land Title and Trust Company."

That we thereupon proceeded to hold an election for or against the adoption of said Resolution; that upon count- [fol. 312] ing the votes at the close of the election we found that 17,484 shares had been voted in favor of the adoption of said Resolution and no shares had been voted against the adoption of said Resolution; and is appearing that a majority of the shares of the capital stock of the Company had been voted in favor thereof, we do hereby declare and return that the said Resolution has been adopted and ratified and confirmed.

Witness our hands and seals this Twenty-fourth day of October, A. D. 1927.

Frank P. Felton (Seal), Augustus Trask Ashton (Seal), Samuel T. Hall (Seal).

Office of The Land Title and Trust Company

October 24, 1927

Return of Judges

We, the undersigned, judges appointed by the Board of Directors of The Land Title and Trust Company to con-

luct an election for the adoption or rejection of an agreement for the merger and consolidation of The Land Title nd Trust Company, The Real Estate Title Insurance and 'rust Company and West End Trust Company, do respectully return:

That a meeting of the Stockholders of The Land Title nd Trust Company, was this day held at the Company's fol. 313] office at Philadelphia, Pennsylvania, and that in ursuance of our above subscribed oaths we did conduct uch an election; that at the time of holding such election he outstanding capital stock of the Company, as shown by he sworn return furnished us by the Secretary of the Company, consisted of 30,000 shares; that there was offered at aid meeting the following Resolution, viz:

"Resolved that the joint agreement entered into the 3rd lay of October, 1927, between the Directors of The Real Estate Title Insurance and Trust Company, the Directors f West End Trust Company and the Directors of The Land Title and Trust Company, for the merger of the said Companies into a corporation to be known as 'The Real Estate-Land Title and Trust Company', be and the same s hereby confirmed ratified and adopted."

That we thereupon proceeded to hold an election for or gainst the adoption of said Resolution; that upon countng the votes at the close of the election we found that 27,656 shares had been voted in favor of the adoption of aid Resolution and no shares had been voted against the doption of said Resolution; and it appearing that a maority of the shares of the capital stock of the Company had een voted in favor thereof, we do hereby declare and return that the said Resolution has been adopted and ratified nd confirmed.

Witness our hands and seals this Twenty-fourth day of October, A. D. 1927.

W. P. Scott (Seal), Samuel E. Edmunds (Seal), C. L. Gilliand (Seal).

[fol. 314] EXHIBIT "E"

IN THE NAME AND BY AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA

Coat of Arms

Executive Department

To all to whom these presents shall come greeting:

Whereas, In and by an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "'An Act authorizing the merger and consolidation of certain corporations approved the third day of May, Anno Domini one thousand nine hundred and nine, the Governor of this Commonwealth is authorized and required to issue

—Letters Patent—

to all corporations organized in accordance with the above recited act,

And Whereas, The directors of the following named Corporations:

The Real Estate Title Insurance and Trust Company of Philadelphia, West End Trust Company, The Land Title and Trust Company, did on the thirty-first day of October, 1927, file in the office of the Secretary of the Commonwealth a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporations, duly approved by the stockholders of each of said corporations;

Therefore, Know Ye, That under authority of the Constitution and laws of said Commonwealth in such case made and provided, I Do by These Presents, which I have caused [fol. 315] to be made Patent and sealed with the Great Seal of the State, declare the said consolidated corporation to be and erect it into a body corporate and politic in deed and in law, by the name, style and title of

—The Real Estate-Land Title and Trust Company—

and entitled to all of the privileges, immunities, franchises and powers conferred by the act entitled "An Act authorizing the merger and consolidation of certain corporations" approved the third day of May, Anno Domini one thousand nine hundred and nine, or which may have heretofore been conferred upon said corporations by any act or acts of the General Assembly of the Commonwealth of Pennsylvania.

Given under my Hand and the Great Seal of the State, at the City of Harrisburg, this thirty-first day of October in the year of our Lord one thousand nine hundred and twenty-seven, and of the Commonwealth the one hundred and fifty-second.

By the Governor:

John G. Fisher. (Seal.)

Charles Johnson, Secretary of the Commonwealth.

Recorded in the Office for Recorded of Deeds, in and for the City and County of Philadelphia, in Charter Book No. 97, Page 521 witness my hand and seal of office this 1st day of November, A. D. 1927.

David Rosher, Deputy Recorder of Deeds.

[fol. 316] EXHIBIT "F"

Real Estate Land Title and Trust Company

Classification of Plant—All Charged to Expense

Date	Searches	Salaries	Stationery	Total
9/30/91	1,415.50			1,415.50
9/30/92	3,275.59	4,671.02		7,946.61
9/30/93	3,160.27	6,328.26		9,488.53
9/30/94	2,033.56	6,319.04		8,352.60
9/30/95	2,915.83	6,703.71		9,619.54
9/30/96	3,173.14	7,179.62		10,352.76
9/30/97	2,513.04	7,672.54		10,185.58
9/30/98	2,873.85	8,386.34		11,260.19
9/30/99	2,359.11	10,436.32	479.90	13,275.33
9/30/1900	1,430.94	11,447.69	667.08	13,545.71
9/30/1901	1,402.33	11,612.13	489.88	13,504.34
9/30/1902	1,670.47	12,048.74	763.31	14,482.52
9/30/1903	1,358.51	12,981.49	1,227.14	15,567.14
9/30/1904	1,393.63	13,710.94	1,139.36	16,243.93
9/30/1905	1,522.49	14,854.80	897.13	17,274.42
9/30/1906	1,603.50	15,454.80	1,116.05	18,174.35
9/30/1907	1,756.69	16,666.59	685.98	19,109.26
9/30/1908	1,438.63	16,577.34	798.10	18,814.07
9/30/1909	1,562.53	15,645.50	658.02	17,866.05
9/30/1910	1,478.10	16,403.05	1,582.52	19,463.67
9/30/1911	1,489.54	17,289.68	859.55	19,638.77
9/30/1912	1,787.41	18,357.32	1,386.96	21,531.69
Oct. 1912	162.03	1,638.17	77.04	1,877.24
Nov. 1912	126.00	1,667.76	94.37	1,888.13
Dec. 1912	101.75	1,612.34	429.84	2,143.93
Jan. 1913	152.93	1,493.38	84.95	1,731.26
Feb. 1913	120.86	1,718.25	1,053.13	2,892.24
	44,278.23	258,876.82	14,490.31	317,645.36

[fol. 317]

Year Ended Sept. 30, 1908

Plant Department

Gross Income (fees)

Oct. 1, 1907 to March 31, 1908	$24,359.80
April 1, 1908 to Sept. 30, 1908	23,991.80
Total	$48,351.60

Expenses:

	Searches	Salaries	Rent	Stationery	Total
First 6 months	$1,870.65	$16,394.01	$3,000.00	$1,064.01	$22,328.67
Second 6 months	1,915.21	15,479.73	3,000.00	709.55	21,104.49
Total	$3,785.86	$31,873.74	$6,000.00	$1,773.56	$43,433.16
Net Profit for year ended September 30, 1908					$4,918.44

[fol. 318]

Title & Conveyancing Department

	Total
Gross Income (fees) Less allocated to Plant fees	
Oct. 1, 1907 to March 31, 1908 to Plant fees	$91,837.97
April 1 to Sept. 30, 1908 to Plant fees	131,922.62
Total	$223,760.59

Expenses	Recording	Salaries	Stationery	Adv.	Rent	Total
1st 6 months	$1,899.15	$43,789.68	$4,856.67	$598.19	$13,200.00	$64,343.69
2nd 6 months	2,350.43	41,619.28	3,314.59	535.27	13,200.00	61,019.57
Total	$4,249.58	$85,408.96	$8,171.26	$1,133.46	$26,400.00	$125,363.26
Net Profit for year ended Sept. 30, 1908						$98,397.33

[fol. 319]

Insurance—$200 Safe Deposit lock inspector to Safe Deposit Department

Total $485.02—$285.02 elevators, boilers, pressure tanks, etc. to Bldg.

Taxes—$26.75 Mercantile tax to Real Estate Department (R. E. Com.)

Total $45,977.55 $21,477.35 Capital stock, etc. to Financial Department
$24,473.45 Real Estate to Real Estate Department.

[fols. 320–321]

Exhibit H

From Treasurers Monthly and Annual Statements and Condition of Company at Close of Business as of October 1, 1908–September 30, 1913

Land Title and Trust Company

	September 30, 1908	September 30, 1909	September 30, 1910	September 30, 1911	September 30, 1912	September 30, 1913	January 31, 1913	February 28, 1913	September 30, 1907
Assets									
Cash: In Office	$424,352.13	$461,976.68	$343,845.08	$388,062.78	$980,622.05	$732,243.22	$483,507.03	$588,996.26	$393,024.98
In banks, Philadelphia	$2,330,065.05	$2,801,426.30	$2,334,933.99	$2,427,178.95	$1,306,495.53	$1,453,543.60	$1,282,072.34	$1,230,488.14	$2,175,983.87
In banks, New York	175,123.93	138,186.33	112,850.52	281,802.28	388,277.05	254,394.72	279,690.61	297,019.85	102,352.67
In Exchange Clearing House	....	....	....	....	1,158,668.43	1,177,462.00	374,391.06	474,927.66	....
Loans on collateral:									
On time	1,865,679.24	700,220.44	888,634.95	474,149.86	605,645.41	633,275.00	510,195.41	500,155.41	1,390,380.00
On demand	2,141,280.09	3,713,062.46	4,095,035.96	4,420,455.76	6,767,932.17	5,711,801.01	5,289,329.29	5,503,810.45	3,972,826.00
Investments:									
Mortgages	469,350.00	1,039,150.00	900,650.00	1,249,650.00	1,401,864.61	1,609,764.61	1,656,264.61	1,718,164.61	275,850.00
Securities	4,417,930.65	3,469,024.28	3,216,749.73	3,261,085.23	2,882,576.78	2,619,159.46	2,854,426.78	2,877,176.78	3,420,319.61
Real Estate	1,581,060.28	1,900,929.58	1,900,929.58	1,900,929.58	1,922,158.73	1,905,241.99	1,922,158.73	1,922,158.73	1,456,060.28
Plant	275,000.00	275,000.00	275,000.00	275,000.00	275,000.00	275,000.00	275,000.00	275,000.00	275,000.00
Accts.: Plant fees outstanding	....	2,658.10	2,200.50	2,181.65	2,291.25	2,350.00	1,980.55	2,355.10	....
T. & C. fees outstanding	37,364.98	42,696.73	30,923.83	48,317.00	56,652.93	29,970.33	30,998.83	38,544.88	41,270.08
T. & C. accts. receivable	4,304.06	5,715.13	2,084.45	1,821.38	1,729.27	2,497.82	2,558.04	1,661.16	4,149.61
T. & C. Collection Ledger	....	....	18,576.51	8,639.01	15,482.37	13,175.48	15,527.10	14,464.93	....
Accrued income	76,514.80	84,544.90	91,821.16	96,466.63	122,306.13	103,523.98	83,839.15	109,223.11	73,143.78
Suspense	500.00	500.00	3,634.24	500.00	500.00	3,742.00	7,750.00	4,942.60	500.00
	$13,798,525.21	$14,635,090.93	$14,217,870.50	$14,836,240.11	$17,888,202.71	$16,527,145.82	$15,087,689.53	$15,559,089.67	$13,580,860.88
Liabilities:									
Capital stock	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00
Surplus fund	2,500,000.00	2,500,000.00	3,000,000.00	3,500,000.00	3,500,000.00	4,000,000.00	4,000,000.00	4,000,000.00	2,500,000.00
Profit and loss	450,705.32	696,396.25	483,634.99	268,241.09	595,878.27	381,146.58	86,730.91	86,289.76	385,530.41
							42,655.13	81,182.45	
								N. G. period	
Reserve, taxes, etc	2,925.00	225.00	600.00	3,000.00	3,600.00	4,500.00	26,300.00	31,812.35	18,875.66
Suspense	25.00	....	....	....	....	....	12,700.00	12,700.00	1,783.33
Deposits	8,783,311.00	9,373,923.17	8,687,014.86	9,014,822.65	11,731,313.10	10,088,424.52	8,792,862.09	9,135,687.55	8,616,008.63
Accrued interest	52,411.58	55,851.32	46,620.65	50,167.37	57,411.34	53,064.22	51,905.37	58,643.06	58,662.85
Dividend	2.50	20.00	....	9.00	....	10.50	70,000.00	105.00	....
Contingent account	9,144.81	8,675.19	....	....	Clearing House Due Bills........		....	152,669.50	....
	$13,798,525.21	$14,635,090.93	$14,217,870.50	$14,836,240.11	$17,888,202.71	$16,527,145.82	$4,536.03	Clearing House due bills	
							$15,087,689.53	$15,559,089.67	$13,580,860.88

Exhibit "G"

Annual Operating Statement—Land Title & Trust Company

Year Ended September 30, 1908

Expenses	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total	To Plant from Title & Conveyancing	To Suspense from Title & Conveyancing	To Title & Conveyancing from Suspense
ries	$48,586.43	$85,408.96	$31,873.74	$21,188.87	$3,376.78	$3,484.52		$193,919.30	$1,629		
ionery, etc.	8,380.98	8,171.26	1,773.56	393.64	278.86	355.37		19,353.67	1,383		
ertising	827.61	1,133.46		811.98				2,773.05	1,073	$4,000 6/30	$4,000 9/11
t	45,000.00	26,400.00	6,000.00	11,000.02	2,400.00	1,200.00		92,000.02	1,276		
es	21,477.35				26.75		$24,473.45	45,977.55	971		
r and Short	102.86							102.86	1,195		
ording Expense		4,249.58						4,249.58	1,346		
rch Expense			3,785.86					3,785.86	1,385		
rance						200.00	285.02	485.02	1,287		
ges							24,056.19	24,056.19	1,103		
und Plant							12,691.67	12,691.67	930		
plies and Repairs							22,265.11	22,265.11	1,128		
Totals	$124,375.23	$125,363.26	$43,433.16	$33,394.51	$6,082.39	$5,239.89	$83,771.44	$421,659.88	$14,706		
Income		(b)	(a)								
s		$223,760.59	$48,351.60	$96,478.65	$10,700.00	$12,933.89		$392,224.73			
rest	$293,107.74							293,107.74			
niums	5,853.90							5,853.90			
istration	9,882.33							9,882.33			
hange	1,517.18							1,517.18			
tals							$159,668.52	159,668.52			
Totals	$310,361.15	$223,760.59	$48,351.60	$96,478.65	$10,700.00	$12,933.89	$159,668.52	$862,254.40			
Profit	$185,985.92	$98,397.33	$4,918.44	$63,084.14	$4,617.61	$7,694.00	$75,897.08	$440,594.52			

(a) Includes $14,706.00 allocated from Title Department.

(b) Includes $4,000.00 from Suspense Account Sept. 11, 1908, transferred from Fees Account to Suspense Account June 30, 1908.

Profit and Loss

idends	$200,000.00	Balance	$385,530.41
tribution	200.00	Net Earnings	440,594.52
. Securities	25,219.61		
Contingent)/9/07 Fund	150,000.00		
	$375,419.61		
ance	450,705.32		
	$826,124.93		$826,124.93

Contingent Acct. balance at 9/30/08 .... $[illegible],144.81

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Annual Operating Statement—Land Title & Trust Co.

Year Ending September 30, 1909

Income	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total
terest	$267,564.84							$267,564.84
	19,000.55							19,000.55
	9,141.30							9,141.30
	487.69							487.69
ees		$244,662.13	$48,523.30	$119,577.26	$10,800.00	$12,737.88		436,300.57
entals							$150,533.53	150,533.53
Totals	$296,194.38	$244,662.13	$48,523.30	$119,577.26	$10,800.00	$12,737.88	$150,533.53	$883,028.48
Expenses								
alaries	$49,448.59	$85,122.46	$30,087.50	$24,832.05	$3,479.50	$3,560.79		$196,530.89
ages							$25,189.27	25,189.27
tationery	4,382.21	4,934.93	1,462.26	4.70	247.33	222.75		11,254.18
dvertising	1,079.80	1,405.84		1,052.46				3,538.10
ent	35,300.00	21,900.00	6,000.00	10,900.00	2,400.00	1,200.00		7,700.00
axes	20,762.18				11.75		24,300.00	45,073.93
horts & Overs	53.79							53.79
ecording, etc.		3,994.27						3,994.27
nsurance		64.00				200.00	515.63	779.63
earches			4,111.92					4,111.92
epairs & Supplies							24,798.22	24,798.22
Totals	$111,026.57	$117,421.50	$41,661.68	$36,789.21	$6,138.58	$5,183.54	$74,803.12	$393,024.20
et Profit	$185,167.81	$127,240.63	$6,861.62	$82,788.05	$4,661.42	$7,554.34	$75,730.41	$490,004.28

	Profit and Loss		
ividends	$200,000.00	Balance	$450,705.32
osses:		Net Earnings	490,004.28
Suretyship	15,041.95		
In re Trust & Conveyancing	4,321.14		
epreciated Securities	24,950.26		
	$244,313.35		
alance	696,396.25		
Total	$940,709.60		$940,709.60

To Plant From Title & Conveyancing
$1,229
1,106
1,188
1,024
1,151
1,296
1,366
1,483
1,036
1,291

From Title and Conveyancing To Suspense Account	
To Suspense	
4/30/09	$15,000.00
5/29	2,500.00
	$17,500.00

To Title and Conveyancing from Suspense	
8/31	$10,000
9/15	7,500
	$17,500

Loss in re Trust & Conveyancing	
#48008	$2,821.14
#44595	800.00
#78797	200.00
#72637	500.00
Total	$4,321.14

[fols. 326–327]

Annual Operating Statement—Land Title & Trust Co.

Year Ended September 30, 1910

Income	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total	To Plant from Title & Conveyancing	To Suspense from Title & Conveyancing		To Title & Conveyancing from Suspense	
Interest	$342,381.84							$342,381.84	$1,505	11/30	$5,000.00	$27,500.00	9/23
Premiums	1,200.00							1,200.00	1,367	4/30	6,500.00	1,500.00	1/31
Registration	8,234.58							8,234.58	1,486	5/31	8,500.00		
Exchange	564.96							564.96	1,290.50	6/30	7,500.00		
Fees		$300,951.45	$48,575.40	$105,083.46	$12,000.00	$13,481.82		480,092.13	1,180		$27,500.00		
Rentals							$144,216.65	144,216.65	1,411	12/31	1,500.00		
Totals	$352,381.38	$300,951.45	$48,575.40	$105,083.46	$12,000.00	$13,-81.82	$144,216.65	$976,690.16	1,765				
									2,031				
									1,737				
									1,586				
									1,271				
									1,396				
Expenses													
Salaries	$53,357.48	$89,399.58	$31,544.32	$25,955.38	$3,750.00	$3,876.18		$207,882.94					
Stationery	5,739.03	9,043.37	3,516.72	516.23	347.22	190.11		19,352.68					
Advertising	1,366.76	1,592.85		1,347.52				4,307.13					
Rent	31,200.00	20,400.60	6,000.00	10,800.00	2,400.00	1,200.00		72,000.00					
Taxes	31,379.77				11.75		$28,575.00	59,966.52					
Shorts & Overs	247.91							247.91					
Recording, etc.		4,666.95						4,666.95					
Insurance		54.75				200.00	328.44	583.19					
Searches			3,889.73					3,889.73					
Wages							24,765.35	24,765.35					
Repairs & Supplies							16,207.68	16,207.68					
Totals	$123,290.95	$125,157.50	$44,950.77	$38,619.13	$6,508.97	$5,466.29	$69,876.47	$413,870.08					
Net Profit	$229,090.43	$176,793.95	$3,624.63	$66,464.33	$5,491.03	$8,015.53	$74,340.18	$562,820.08					

		Profit and Loss	
Dividend	$240,000.00	Balance Forwarded	$696,396.25
Overdraft	253.78	Net Earnings	562,820.08
To Surplus	500,000.00		
Dep. in Securities	35,327.56		
	$775,581.34		
Balance b/s	483,634.99		
	$1,259,216.33		$1,259,216.33

ol. 328–329]

Annual Operating Statement—Land Title & Trust Co.

Year Ending September 30, 1911

Income	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total
nterest	$327,307.69							$327,307.69
remiums	900.00							900.00
egistration	8,621.08							8,621.08
xchange	436.55							436.55
ees		$325,258.03	$48,871.35	$90,137.73	$12,500.00	$14,398.13	$143,912.73	$635,077.97
entals								
Totals	$337,265.32	$325,258.03	$48,871.35	$90,137.73	$12,500.00	$14,398.13	$143,912.73	$972,343.29
Expenses								
alaries	$57,196.48	$95,601.17	$33,249.39	$29,430.21	$4,242.00	$4,963.18		$224,682.43
tationery	6,798.66	5,687.65	1,910.11	3,021.33	320.77	268.40		18,006.92
dvertising	831.35	859.49		774.29				2,465.13
ent	31,200.00	20,400.00	6,000.00	10,800.00	2,400.00	1,200.00		72,000.00
axes	34,779.27			358.18	26.75		$32,850.00	68,014.20
horts & Overs	5.37							5.37
nsurance		181.36				200.00	240.68	622.04
ecording, etc.		5,081.09						5,081.09
earches			3,919.85					3,919.85
ages							25,042.53	25,042.53
epairs & Supplies							19,497.15	19,497.15
Totals	$130,811.13	$127,810.76	$45,079.35	$44,384.01	$6,989.52	$6,631.58	$77,630.36	$439,336.71
et Profit	$206,454.19	$197,447.27	$3,792.00	$45,753.72	$5,510.48	$7,766.55	$66,282.37	$533,006.58

		Profit and Loss	
ividends	$240,000.00	Balance	$483,634.99
verdraft	37.73	Profit	533,006.58
o Surplus	500,000.00		
osses under itle Policies	8,362.75		
	$784,400.48		
alance	268,241.09		
Total	$1,016,641.57		$1,016,641.57

To Plant from Title & Conveyancing
$1,627.00
2,025.50
1,838.60
1,518.90
1,722.60
2,189.80
1,941.35
2,154.70
1,794.32
1,471.70
1,433.30
1,619.30

To Suspense from Title & Conveyancing	
$2,500.00	11/31
3,000.00	3/31
3,000.00	4/29
10,000.00	5/31
2,500.00	10/31
$21,000.00	

To Title & Conveyancing from Suspense	
$8,000.00	7/31
13,000.00	8/31
$21,000.00	

Losses Title Policies

#104469	$2,000.00
104230	1,000.00
117641	800.00
113680	4,562.75
	$8,362.75

[fols. 330–331]

Annual Operating Statement—Land Title & Trust Co.

Year Ended September 30, 1912

Income	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total
Interest	$348,110.44							$348,110.44
Premiums	5,790.50							5,790.50
Registration Fees	9,352.57							9,352.57
Exchange	439.21							439.21
Fees		$412,098.43	$54,544.10	$82,108.75	$10,350.00	$14,642.25		573,743.53
Rentals							$143,878.83	143,878.83
Totals	$363,692.72	$412,098.43	$54,544.10	$82,108.75	$10,350.00	$14,642.25	$143,878.83	$1,081,315.08
Expenses								
Salaries	$56,364.48	$103,744.51	$35,302.54	$29,531.68	$3,810.33	$5,280.00	$25,546.44	$259,579.98
Stationery	9,405.77	12,676.76	3,082.12	3,858.83	507.40	398.27		29,929.15
Advertising	578.13	535.37		535.06				1,648.56
Rent	31,200.00	20,400.00	6,000.00	10,800.00	2,400.00	1,200.00		72,000.00
Insurance	443.65	266.62		210.00	20.10	230.00	504.65	1,675.05
Taxes	34,279.30			405.42	26.75		30,000.00	64,711.47
Shorts & Overs	176.43							176.43
Recording, etc		4,718.46						4,718.46
Searches			4,703.70					4,703.70
Repairs & Supplies							22,424.27	22,424.27
Totals	$132,447.76	$142,341.72	$49,088.36	$45,341.02	$6,764.58	$7,108.27	$78,475.36	$461,567.07
Net Profit	$231,244.96	$269,756.71	$5,455.74	$36,767.73	$3,585.42	$7,533.98	$65,403.47	$619,748.01

To Plant from Title & Conveyancing	To Suspense from Title & Conveyancing	To Title & Conveyancing from Suspense
$1,876.65	$3,000.00 6/29	$10,000.00 11/29
1,921.00	$43,000.00 9/28	13,000.00 3/30
2,086.30		13,000.00 4/30
1,902.95		10,000.00 7/31
1,780.45		
2,437.70	$46,000.00	$46,000.00
2,361.90		
2,989.60		
2,208.60		
1,961.40		
1,782.50		
1,906.40		

Profit and Loss

Dividends	$280,000.00	Balance	$268,241.09
Membership Philadelphia Clearing House	10,000.00	Earnings	619,748.01
Loss Title Policy #121726	2,110.83		
	$292,110.83		
Balance b/s	595,878.27		
	$887,989.10		$887,989.10

[fols. 332–333]

Annual Operating Statement—Land Title & Trust Co.

Six Months Ended March 31, 1913

Expenses	Financial Department	Title and Conveyancing Department	Plant	Trust Department	Real Estate Department	Safe Deposit Department	Building, Broad & Chester	Total	To Plant from Title & Conveyancing	To Suspense from Title & Conveyancing	To Title & Conveyancing from Suspense
Salaries	$29,355.92	$55,167.31	$18,623.05	$15,807.04	$1,980.00	$2,640.00	$12,817.15	$136,390.47	$2,201.50	$10,000.00 10/31	$3,500.00 12/3
Stationery, etc.	3,609.97	5,716.87	3,965.32	2,535.62	252.68	168.97		16,249.43	2,025.00		
Advertising	371.84	327.59		327.15				1,026.58	1,705.10		
Rent	15,600.00	10,200.00	3,000.00	5,400.00	1,200.00	600.00		36,000.00	1,928.20		
Taxes	19,423.70				26.75		15,000.00	34,450.45	1,733.60		
Over & Short	124.27							124.27	2,041.60		
Recording		2,040.79						2,040.79			
Searches			2,132.69					2,132.69	$11,625.00		
Insurance	443.73			169.65	21.25	130.00	277.94	1,210.46			
Wages (salaries)											
Supplies & Repairs							10,503.91	10,503.91			
Totals	$68,929.43	$73,620.45	$27,721.06	$24,239.46	$3,480.68	$3,538.97	$38,599.00	$240,129.05			
Income											
Fees (10/1 to 12/31)		$67,209.57	$12,739.70	$23,124.45	$3,300.00	$4,118.70	$36,730.32	$147,222.74			
Registration)	$3,397.50							3,397.50			
Exchange) 10/1 to	52.38							52.38			
Interest) 21/31	103,723.95							103,723.95			
Fees (1/1 to 3/31)		59,225.99	11,822.95	36,837.14	3,250.00	4,430.05	37,289.20	152,855.33			
Registration)	1,541.76							1,541.76			
Exchange)	85.40							85.40			
Interest) 1/1 to	97,763.10							97,763.10			
Premiums) 3/31	444.92							444.92			
Totals	$207,009.01	$126,435.56	$24,562.65	$59,961.59	$6,550.00	$8,548.75	$74,019.52	$507,087.00			
Net Profit per A. S.	$138,079.58	$52,815.11	(3,158.41)	$35,722.13	$3,069.32	$5,009.78	$35,420.52	$266,958.03			

Profit and Loss

Loss, Title & Conveyancing	$3,836.40	Balance	$595,878.27
Dividends	140,000.00	Profit	266,958.03
To Surplus	500,000.00		
Loss, searches	184.19		
	$644,020.59		
Balance per b/s	218,815.71		
	$862,836.30		$862,836.30

[fol. 334] **Exhibit I**

United States (Seal) of America

Treasury Department, Washington

February 1, 1936.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Claim for Refund of $153,-125.00 Income Tax for fiscal year ended October 31, 1928 (with statement attached), filed by Real Estate-Land Title and Trust Company, Philadelphia, Pennsylvania; Copy of letter dated February 11, 1931, to The Real Estate-Land Title and Trust Company, Philadelphia, Pennsylvania, from J. C. Wilmer, Deputy Commissioner; Copy of letter dated February 20, 1931, to The Real Estate-Land Title and Trust Company, Philadelphia, Pennsylvania, from J. C. Wilmer, Deputy Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury: F. A. Birgfeld, Chief Clerk, Treasury Department. (Seal)
[fol. 335] H.
G. G. L., W. W. Bauer, T. H. L., C. J., S. S. F., H. O.

Treasury Department, Chief Clerk and Superintendent

Form 66—Revised November, 1929. U. S. Government Printing Office, 1929 2—8615

(Execute Separate Form for Each Tax Period)

Claim for

| | | Abatement of Tax Assessed
| | | Credit Against Outstanding Assessments
| X | Refund of Taxes Illegally Collected
| | | Refund of Amounts Paid for Stamps
Used in error or excess

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Controller General U. S.
January 18, 1922

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

2393

State of Pennsylvania
County of Philadelphia } ss:

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

[ ]

Stamp here

[fol. 336] Collector's Notation

District
Account number

1930 Aug. 31—C4 1929, June 400028

Date received

[Received Dec. 13, 1930
Phila. 1st Int. Rev. Pa.]

(Above stamp upside down)

Stamp here

Collector of Internal Revenue
[Received Jan. 6, 1931
Claims Control Section]

[Type or Print]

The Real Estate-Land Title and Trust Company
(Name of taxpayer or purchaser of stamps)
Real Estate Title Insurance & Trust Co.

(Residence—give street and number as well as city or town and State.)
S. W. Corner Broad and Chestnut Streets,
Philadelphia, Pa. 1 Pa
West End Trust Co.—Land Title & Trust Co.
2161996 (In margin at left.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From: November 1	1927
To: October 31	1928

1. Business in which engaged. Banking and Trust.

2. Character of assessment or tax. Income. (State for or upon what the tax was assessed or the stamps affixed.)

[fol. 337] 3. Amount of assessment (words crossed out) .... $313,457.

4. Reduction of Tax Liability requested (Income and Profits Tax) .... $153,125.

5. Amount to be abated .... $ ....

6. Amount to be refunded (or such greater amount as is legally refundable .... $153,125.

(✓ After above figur

7. Dates of payment (see Collector's receipts or endorsments of canceled checks). 1/15/29; 4/15/29; 7/14/2 10/15/29; 9/3/30. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed. Philadelphia, Pa.

9. District in which unpaid assessment appears. ——.

10. Amount of overpayment claimed as credit. $——.

11. Unpaid assessment against which credit is ask from —— to ——. $——.

Deponent verily believes that this application should allowed for the following reasons:

Fisc 10-31-1928 (Written across above items)

(Attach additional sheets if necessary.)

(Signed) The Real Estate-Land Title and Tru Company, by W. B. Christian, Vice-Pres. Samu L. Hayes. (Seal.)

[fol. 338] Sworn to and subscribed before me this 12 day — November, 1930.

Elizabeth M. King, Notary Public. My Commissi Expires Mar. 16, 1933.

(This affidavit may be sworn to before a Deputy Collect of Internal Revenue or Revenue Agent without charge.)

02—11704

[fol. 339]

(Seal) 2/14/31 (Seal)

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer	Character of Assessment and Period Covered	List	Year	Month	Page	Line	Amount	Date Paid	District in Which Paid
	11/1/27	It	1929	Jan.	4,000	28	$312,592.67		
							78,148.17	1/16/29	
	to						78,148.17	4/16	
							78,148.17	7/16	
	10/31/28						78,148.16	10/16	
	addl.		1930	Aug.	31c	#4	865.06	9/6/30	
						Int.....	83.31		

(√ after the words "Year" and "Line" in the above columns.)

[fol. 340]

Schedule No. .... (In margin at right.)

J. S. MacLaughlin 1st Pa.
Collector of Internal Revenue

Per O. B. Myers, D. C.
Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of Sale or Issue	Amount	If Special Tax Stamp, State: Serial Number	Period Commencing–
....	....	....	....	....	$........	....	....
....	....	....	....	....	....	....	....
....	....	....	....	....	....	....	....

Claim No. .... (In lefthand margin.)

Claim No. .... (In righthand margin.)
Collector .... District ....

[fol. 341]

Schedule Number 18217
Allowed or Rejected Number .... T. Schedule

District ....

....

(Nature of tax.)

Claimant ....

Address ....

Examined and submitted for action ...., 19...

Committee on Claims

Claim examined by L. B. W. 2/6/31	Amount claimed	$153,125.00
Claim approved by Chief of Division	Amount allowed	$: None
	Amount rejected	$153,125.00

2-11704

Government Printing Office

[fol. 342] Taxpayer avers that the Real Estate Title Insurance and Trust Company of Philadelphia, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, the West End Trust Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, and The Land Title and Trust Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania, and a majority of the Board of Directors of the said Company, entered into an agreement of consolidation and merger, which agreement was dated the 3rd day of October, 1927, under the provisions of which the said three companies and the said Directors agreed, inter alia, that upon the due approval of the said agreement by the holders of a majority in amount of the entire capital stock of each of said corporations at special meetings of the Stockholders thereof, duly called and held for that purpose, the filing of certificates thereof and a copy of the said agreement in the office of the Secretary of the Commonwealth, and the issuing of Letters Patent thereon by the Governor, a merger of the said three above mentioned companies shall be deemed to have taken place, and the said corporations shall be one corporation under the name adopted in and by the said agreement, namely, the Real Estate-Land Title and Trust Company, possessing all and singular the rights, privileges and franchises vested in each of the said companies, and all estate and property, real and personal, and the rights of action of each of said corporations shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title [fol. 343] and Trust Company, without any further act or deed.

Taxpayer avers that on the 31st day of October, 1927, Letters Patent were duly issued by the Secretary of the Commonwealth of Pennsylvania, said Letters Patent being recorded in the Office of the Recorder of Deeds in and for the County of Philadelphia in Charter Book No. 97, page 521, and that all of the rights, privileges and franchises and all of the estate and property, real and personal of each of the said corporations, became transferred to and vested in the said The Real Estate-Land Title and Trust Company.

Taxpayer avers that the organization meeting of the Directors of The Real Estate-Land Title and Trust Company.

was held on the 31st day of October, 1927, at 3:15 P. M., and that the said The Real Estate-Land Title and Trust Company began business on November 1, 1927.

Taxpayer avers that The Land Title and Trust Company, one of the above named companies, prior to the merger of the said company with the other companies to form The Real Estate-Land Title and Trust Company, carried on the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets, at the date of the said merger, a title insurance plant. Taxpayer further avers that the Real Estate Title Insurance and Trust Company, prior to the merger with the other companies above mentioned to form The Real Estate-Land Title and Trust Company, carried on the business of insuring titles to real estate in the City of Philadelphia, and had as one of its assets at the date of the said merger, a title plant.

Taxpayer avers that for the purposes of the said merger [fol. 344] the title plant then owned by the Real Estate Title Insurance and Trust Company was valued at $800,000, and the title plant then owned by The Land Title and Trust Company was valued at $800,000.

Taxpayer avers that in order to carry on the business of insuring titles to real estate in Philadelphia it was not necessary to have two title insurance plants, and, therefore, it did not keep up-to-date the plant formerly owned by The Land Title and Trust Company. Taxpayer avers that the plant formerly owned by The Land Title and Trust Company, while a complete plant, could not be operated as expeditiously and as economically as the plant formerly owned by the Real Estate Title Insurance and Trust Company. Taxpayer therefore avers that since the title plant formerly owned by The Land Title and Trust Company, was not kept up-to-date during the fiscal year ending October 31, 1928, it became obsolete during the said year, and taxpayer therefore is entitled to a loss due to obsolescence of the said plant during the said year.

Taxpayer avers that the merger or consolidation of the said companies above mentioned was a reorganization within the meaning of the provisions of the Revenue Act properly applicable thereto, and that the basis for determining loss in connection with the said plant is the same basis as would have been used by The Land Title and Trust Company for determining profit or loss in connection with the sale or other disposition of the said plant.

Taxpayer avers that the original plant was installed in 1886 and 1887, and taxpayer is advised that the value of the said plant on March 1, 1913, was $1,250,000.

[fol. 345] Taxpayer therefore claims a loss for income tax purposes for the fiscal year ending October 31, 1928, in the amount of $1,250,000, on account of obsolescence of the said title plant.

Taxpayer avers that for the fiscal year ending October 31, 1928, it paid income tax as follows:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
September 3, 1930	865.06

Taxpayer further avers that the payment of $865.06 on September 3, 1930, was the payment of an additional assessment, at which time taxpayer paid $83.31 interest.

Taxpayer therefore respectfully requests the refund of tax in the amount of $153,125, with interest on the said amount from the respective dates of payment, and also requests the refund of $83.31 representing interest paid on September 3, 1930, with interest thereon from the date of said payment.

B-3

[fol. 346] EXHIBIT J

Mailed Feb. 11, 1931.

Received
Feb. 13, 1931
Claims Control
Section

IT:AR:B-6
LBW

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

SIRS:

Your claim for the refund of $153,125.00 income tax for the fiscal year ended October 31, 1928, has been examined and will be rejected for the following reasons:

Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company be-

came obsolete and was abandoned; that the plant had a value of $1,250,000.00, and, therefore, a loss on account of obsolescense should be allowed in this amount.

In an assessment letter from the Bureau dated June 6, 1930, this question was considered; also your contentions were considered in conference in this office on April 30, 1930 and on May 12, 1930. Your contentions were denied in each case. As no additional information has been submitted that would justify the Bureau in changing its previous determination, the claim will be rejected.

The rejection of this claim will appear officially on the next [fol. 347] list for your district to be approved by the Commissioner.

Respectfully, J. C. Wilmer, Deputy Commissioner.
By (Signed) H. B. Robinson, Head of Division.

[Rejected
, 18217
Schedule]

ECC-2
LBW, 2/6/31; HCR, 2/6/31; FRL, 2/6/31; FRL, 2/7/31.
B4

Exhibit K

(Seal)

Office of Commissioner of Internal Revenue

IT:C:CC—

Treasury Department,
Washington,
Feb. 20, 1931.

The Real Estate-Land Title and Trust Company,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

In re: Refund Claim for year 10/31/28
Amount, $153,125.00

Sirs:

Your claim for refund of taxes, above referred to, was dis-[fol. 348] allowed by the Commissioner on a schedule dated February 20, 1931.

Respectfully, J. C. Wilmer, Deputy Commissioner.
By ——, Head of Division.

(1203M)
ML
B-5

Stipulation of Facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this action, provided, however, that this stipulation shall be without prejudice to the right of each party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true and the right of each party is hereby reserved to object to the relevancy, competency and/or materiality of any and all of the facts so stipulated to be taken as true.

1. The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above-entitled proceeding, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at the Southwest corner of Broad and Chestnut [fol. 349] Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania.

2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795), plaintiff-petitioner herein, on January 15, 1929, filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928, a photostatic copy of which is attached hereto, marked Exhibit "A", and by this reference made a part hereof, and a part of the evidence in this proceeding.

3. The amount of net income reported on the said income tax return filed by the said Real Estate-Land Title and Trust Company for the fiscal year ending October 31, 1928, as aforesaid, was $2,551,776.91, upon which amount of net income there was shown due on the said return for the said fiscal year Federal income tax in the amount of $312,592.67.

4. The said amount of Federal income tax, namely, $312,592.67, shown due as aforesaid for the fiscal year ending October 31, 1928, was assessed against the said Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, and was paid by the said Real Estate-Land Title and Trust Company to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following installments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

[fol. 350] 5. During the calendar year 1929 a representative from the office of the Internal Revenue Agent in Charge at Philadelphia made an examination in connection with the Federal income tax return filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928, as aforesaid, and as a result of such examination recommended an additional Federal income tax against plaintiff-petitioner for the said fiscal year in the amount of $865.06, which additional Federal income tax was in due course assessed against plaintiff-petitioner herein by the Commissioner of Internal Revenue, a copy of the letter from David Burnet, Deputy Commissioner of Internal Revenue dated March 20, 1930, and a copy of the letter from Robert H. Lucas, Commissioner of Internal Revenue dated June 6, 1930, being hereto attached and marked respectively Exhibits "B" and "C", and hereby made a part hereof and a part of the evidence in this proceeding.

6. The said additional Federal income tax amounting to $865.06, together with interest thereon amounting to $83.31, was paid by plaintiff-petitioner herein to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, on September 3, 1930, in response to a demand therefor by the said Collector.

7. The Real Estate Title Insurance and Trust Company of Philadelphia, a corporation with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of that company, the West End Trust Company, a corporation with its principal office in Philadelphia, Pennsylvania and a majority of the Board of Directors of that [fol. 351] company, and the Land Title and Trust Company, a corporation with its principal office in Philadelphia, Pennsylvania, and a majority of the Board of Directors of that company, entered into an agreement of consolidation and merger, which agreement was dated October 3, 1927, under the provisions of which it was agreed, inter alia, that upon the due approval of the said agreement by the holders of a

majority in amount of the entire capital stock of each of the said corporations at special meetings of the stockholders thereof, duly called and held for that purpose, the filing of certificates thereof and a copy of the said agreement in the office of the Secretary of the Commonwealth, and the issuing of Letters Patent thereon by the Governor, a merger of the three above-mentioned companies shall be deemed to have taken place, and the said corporations parties to the said agreement shall be one corporation under the name adopted in and by the said agreement, namely, The Real Estate-Land Title and Trust Company, possessing all and singular the rights, privileges and franchises vested in each of the said companies; and all estate and property, real and personal, and the rights of action of each of said corporations, as set forth in said agreement, shall be deemed and taken to be transferred to and vested in The Real Estate-Land Title and Trust Company without any further act or deed, a copy of said agreement dated October 3, 1927, being hereto attached, marked Exhibit "D", and by this reference made a part hereof and a part of the evidence in this proceeding.

8. The merger and consolidation of the said three companies, to wit, the Real Estate Title Insurance and Trust [fol. 352] Company of Philadelphia, the West End Trust Company and the Land Title and Trust Company, into The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, was effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the 3rd day of May, A. D. 1909, P. L. 408, and supplements thereto.

9. The necessary special meetings of stockholders of the said companies, namely, the Real Estate Title Insurance and Trust Company of Philadelphia, the West End Trust Company and the Land Title and Trust Company, having been duly called and held, at each of which meetings the necessary approval of stockholders to the said agreement of consolidation and merger was obtained, and the necessary certificates together with a copy of the said agreement of consolidation and merger dated October 3, 1927, having been filed in the office of the Secretary of the Commonwealth, Letters Patent were issued by the Governor of the Commonwealth of Pennsylvania to The Real Estate-Land Title and

rust Company, plaintiff-petitioner herein, on October 31, 927 (said Letters Patent being recorded in the Office of the ecorder of Deeds in and for the County of Philadelphia in harter Book No. 97, Page 521), whereupon a merger of the id Real Estate Title Insurance and Trust Company of hiladelphia, the said West End Trust Company and the id Land Title and Trust Company took place, and all of e rights, privileges and franchises, and all of the assets, tate and property, real and personal, of each of the said rporations, namely, the Real Estate Title Insurance and ol. 353] Trust Company of Philadelphia, the West End rust Company and the Land Title and Trust Company, set forth in said agreement, became transferred to and sted in the said The Real Estate-Land Title and Trust ompany, plaintiff-petitioner herein, under the provisions the said Act of May 3, 1909, P. L. 408, and supplements ereto, copy of the said Letters Patent issued by the Govnor of the Commonwealth of Pennsylvania, to The Real state-Land Title and Trust Company as aforesaid, being reto attached, marked Exhibit "E", and by this refer-ice made a part hereof and a part of the evidence in this oceeding.

10. All of the terms and provisions of the said agree-ent of merger and consolidation dated October 3, 1927, aforesaid, were performed and carried out by the respec-ve parties thereto as provided in the said agreement. The ganization meeting of the Directors of The Real Estate-and Title and Trust Company, plaintiff-petitioner herein, as held at 3:15 P. M. on the 31st day of October, 1927, and e said The Real Estate-Land Title and Trust Company, aintiff-petitioner herein, opened for business on Novem-r 1, 1927.

11. Prior to the said merger the said Real Estate Title surance and Trust Company of Philadelphia and the id Land Title and Trust Company each carried on its oks an asset account captioned "title plant" in the nounts of $143,000.00 and $275,000.00, respectively. For e purpose of the aforesaid merger, the subject matter of id asset account entitled "title plant" of the Real Estate tle Insurance and Trust Company of Philadelphia was ol. 354] appreciated $657,000.00, or to a total amount of 00,000.00, and the subject matter of said asset account titled "title plant" of the said Land Title and Trust Com-

pany was appreicated $525,000.00, or to a total amount of $800,000.00. The subject matter of each of said asset accounts entitled "title plant" was acquired by the said plaintiff-petitioner herein from the said Real Estate Title Insurance and Trust Company and the said Land Title and Trust Company, respectively, at the time of and as a part of the said merger, under the provisions of the Act of May 3, 1909, P. L. 408, and supplements thereto, as part of the assets of these companies at the valuation of $800,000.00 each, and said valuations were accepted and acted upon in determining the distribution of the stock of the new or merged corporation (plaintiff-petitioner herein) between the stockholders of the corporations, parties to the merger, to whom all of the capital stock of the plaintiff-petitioner was issued. As of the date of the said merger the plaintiff-petitioner in this case entered on its books as an asset "title plant, $1,600,000.00." No other asset directly attributable or necessary to the conduct of title searching, certification, insurance, conveyancing or settlements was entered on the books of the consolidated or merged corporation.

12. At the time of the aforesaid merger the Land Title and Trust Company had issued a total of 342,067 policies of title insurance and the Real Estate Title Insurance and Trust Company had issued a total of 436,950 policies of title insurance.

The parties to the merger knew before the merger was effected that the new or merged corporation was about to acquire two title plants designed and used for the same [fol. 355] general purpose by two of the merging corporations, i. e., the Real Estate Title Insurance and Trust Company and the Land Title and Trust Company.

13. The said title insurance plant formerly owned by the said Land Title and Trust Company and acquired by plaintiff-petitioner at the time of the said merger, as aforesaid, was acquired by the said Land Title and Trust Company during the years 1886 and 1887 at a cost of $251,509.84. In the years 1888 and 1889 additions to said plant were made by the said Land Title and Trust Company at a cost of $23,455.21. In the year 1890 additions to said plant were made costing $1,086.57. For the period from 1890 to February 28, 1913, there was expended for searches and plant expenses by the said Land Title and Trust Company the

n of at least $317,645.36, which was charged to expense the books of the said company, as per statement hereto ached and marked Exhibit "F", by reference made a t hereof and a part of the evidence in this proceeding. om February 28, 1913, until the date of the merger of the d companies the expenses incurred by the said Land Title l Trust Company on account of searches and title plant re charged to expense on the books of the said company. After September 30, 1891, the said title plant was carried the books of the said Land Title and Trust Company at a uation of $276,051.62 until September 30, 1897, when this ount was reduced to $275,000.00—which figure remained same up to just prior to the merger above referred to.

4. On the books of the Land Title and Trust Company aries of some of the general officers were charged to the l. 356] various departments in the following propor- ns: "Financial Department," one-half; "Title and Con- ancing Department," one-quarter; "Trust Depart- nt," one-quarter. Other expenses as well as salaries some of the general officers were charged directly to the artments to which they applied.

5. Operating statements of the Land Title and Trust npany for the years ended September 30, 1908, 1909, 0, 1911 and 1912, and for the six-months' period ended rch 31, 1913, and balance sheets as of September 30 of h of the years 1907 to 1913, and as of January 31 and oruary 28, 1913, consisting of eight sheets, are attached eto, marked Exhibits "G" and "H", and by reference le a part hereof and a part of the evidence in this pro- ding.

6. Prior to the merger aforesaid, the Land Title and st Company, in its Federal capital stock tax returns the years 1917 to 1926, inclusive, returned the book ie of its title plant and the fair value of its "Title Plant" he amount of $275,000.00 for all of said years.

7. The said merger of the said Real Estate Title In- ance and Trust Company, the said West End Trust npany and the said Land Title and Trust Company was ansaction in which no gain or loss to any of the said panies was recognized for purposes of Federal income under the provisions of the Revenue Act of Congress perly applicable thereto.

18. The said title insurance plant owned by the said [fol. 357] Land Title and Trust Company at the time of the said merger, was originally installed by the said Land Title and Trust Company during the years 1886 and 1887. The said Land Title and Trust Company received no deduction for income tax purposes for depreciation, wear and tear, obsolescence, amortization or depletion on the said plant or any part thereof during the period March 1, 1913, to and including October 31, 1927, the date of the merger above referred to, and no deduction was properly allowable for income tax purposes for depreciation, wear and tear, obsolescence, amortization or depletion on the said plant or any part thereof during the said period.

19. In arriving at the amount of income tax claimed by the Commissioner of Internal Revenue and actually paid to the Collector of Internal Revenue at Philadelphia, Pennsylvania, by the plaintiff-petitioner for its fiscal year ending October 31, 1928, no deduction was allowed by the Commissioner of Internal Revenue in determining the amount of net income upon which said tax was computed, for obsolescence, abandonment, depletion, amortization or depreciation of the said title insurance plant formerly owned by the said Land Title and Trust Company, which title insurance plant, by the said merger of the companies above named, had become the property of the plaintiff-petitioner.

20. On or about December 12, 1930, plaintiff-petitioner herein filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claim for refund of Federal income tax for the fiscal year ending October 31, [fol. 358] 1928, in the amount of $153,125.00, on Form 843, alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the said title insurance plant (formerly owned by the Land Title and Trust Company) during the said fiscal year, copy of the said claim for refund being hereto attached, marked Exhibit "I", and by reference made a part hereof and a part of the evidence in this proceeding.

21. The then Commissioner of Internal Revenue refused to refund to plaintiff-petitioner herein the said amount of $153,125.00, or any other amount for the fiscal year ending

October 31, 1928, and on the 20th day of February, 1931, the then Commissioner of Internal Revenue disallowed the said claim for refund filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928, as aforesaid, copy of the letter advising plaintiff-petitioner that its claim would be rejected, and copy of letter advising that it had been disallowed being hereto attached, marked Exhibits "J" and "K", respectively, and by reference made parts hereof and parts of the evidence in this proceeding.

22. This action was brought for the recovery of Federal income tax, which income tax is an internal revenue tax and was collected by Joseph S. McLaughlin as Collector of Internal Revenue for the First District of Pennsylvania, the said Joseph S. McLaughlin having been Collector of Internal Revenue for the First District of Pennsylvania at the times of the payment of the income tax and interest, for the recovery of which this proceeding was instituted. The said Joseph S. McLaughlin was dead at the time this proceeding was commenced and therefore not in office as Collector of Internal Revenue at such time, and no part [fol. 359] of the said income tax or interest, for the recovery of which this proceeding was instituted, was paid to the Collector of Internal Revenue for the First District of Pennsylvania who was in office at the time this proceeding was commenced.

23. This proceeding was commenced after the passage of the Revenue Act of 1921, for the recovery of an internal revenue tax alleged by plaintiff-petitioner to have been erroneously and illegally assessed and collected. This suit was brought within six years after the right accrued for which claim is made in this proceeding.

Saul, Ewing, Remick & Saul, by Joseph Neff Ewing, Attorney for Plaintiff-Petitioner; Chas. D. McAvoy, U. S. Att'y., by Thomas J. Curtin; Lester F. Gibson, Special Ass't. to Att'y. General, Attorneys for the United States.

MICRO CARD 22

TRADE MARK ®

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MATTHEW BENDER & COMPANY

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[fol. 360]

EXHIBIT "D-1"

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1921

Income	Financial Dept.	Title and Convey-ancing Dept.	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Broad, Chestnut & Sansom Sts.	Totals
Premium	$2,615.30							
Registration Fees	23,086.40							
Exchange	2,143.53							
Interest	794,894.89							
Fees		$414,309.92	$81,242.25	$232,560.43	$146,433.46	$26,308.44	$1,081,233.15	
Rentals								$2,804,827.78
Totals	$822,740.12	$414,309.92	$81,242.25	$232,560.43	$146,433.46	$26,308.44	$1,081,233.15	
Expenses								
Advertising	$1,918.73	$2,341.88		$1,697.39	$2,322.18			
Insurance	1,300.67	916.73		1,093.58	549.56	$258.76	$3,586.67	
Rent	52,779.18	53,336.15	$12,500.00	27,225.00	11,400.00	4,000.00	40,000.00	
Salaries	129,116.19	183,372.66	65,187.71	53,011.18	38,155.85	8,442.96	195,015.08	
Shorts & Overs	354.55			28.00				

[fol. 361]

Stationery	24,503.30	21,172.18	8,564.91	11,700.56	8,581.65	4,564.93		
Taxes	156,162.64	54,250.00		13,519.40	18,000.00		232,132.50	
Recording		9,573.25						
Searches			6,726.55					
Repairs & Supplies							200,467.66	
Totals	$366,135.26	$321,962.85	$92,979.17	$108,275.11	$79,009.24	$17,266.65	$671,201.91	$1,656,830.19
Net Earnings	$456,604.86	$92,347.07*	$11,736.92	$124,285.32	$67,424.22	$9,041.79	$410,031.24	$1,147,907.58

Profit and Loss

Dividends	$600,000.00	Balance	$1,028,047.90
Losses:		Net Earnings	1,147,997.58
Sale of Securities	38,711.37		
Suit	4,100.00		
Transfer to Surplus	500,000.00		
	$1,142,811.37		
Balance	$1,033,234.11		
	$2,176,045.48		$2,176,045.48

Note: Balance sheet as of Sept. 30, 1921 carries an account shown as "Plant" $275,000.00

* These Figures are circled.

[fol. 362]

EXHIBIT "D-1"—Continued

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1922

Income	Financial Dept.	Title and Conveyancing Dept.	Plants	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Broad, Chestnut & Sansom Sts.	Totals
Premium	$2,667.43							$2,667.43
Registration Fees	17,095.81							17,095.81
Exchange	1,568.97							1,568.97
Interest	820,077.37							820,077.37
Fees		$580,623.70	$111,207.49	$180,410.85	$308,613.15	$26,213.86	$1,044,824.21	
Rentals								
Totals	$841,409.58	$580,623.70	$111,207.49	$180,410.85	$308,613.15	$26,213.86	$1,044,824.21	
Expenses								
Advertising	$3,391.70	$4,198.16		3,188.00	4,089.00			
Insurance	1,596.35	975.04		1,041.05	412.85	$293.99	$2,472.59	
Rent	51,750.12	56,400.00	18,000.00	30,000.00	15,600.00	9,600.00	40,000.00	
Salaries	134,636.57	199,929.21	70,009.46	55,640.95	28,377.60	8,508.00	184,816.81	

[fol. 363]

Shorts & Overs	672.34							
Stationery	31,605.13	21,792.13	7,443.63	9,646.53	8,370.10	1,008.83		
Taxes	102,656.98	27,000.00		12,275.02	15,000.00		287,377.00	
Recording		15,469.27						
Searches			16,141.04					
Repairs & Supplies							186,010.26	
Totals	$326,309.19	$325,763.81	$111,594.13	$111,791.55	$71,849.55	$19,410.82	$700,676.66	$1,667,395.00
Net Earnings	$515,100.39	$254,859.89*	$386.64	$68,619.30	$236,763.60	$6,803.04	$344,147.55	$1,425,907.13

Profit and Loss

Dividends	$660,000.00	Balance	$1,033,234.11
Losses:		Earnings	1,425,907.13
T. & C.	7,865.19	Profit on sale	11,100.00
Transferred to Surplus	$1,000,000.00		
	$1,667,865.19		
Balance	$802,376.05		
	$2,470,241.24		$2,470,241.24

Note: The Balance sheet for Fy also carries an acount shown as "Plant" $275,000.00

* These Figures are circled.

EXHIBIT "D-1"—Continued

[fol. 364]

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1923

Income	Financial Dept.	Title and Conveyancing Dept.	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Broad, Chestnut & Sansom Sts.	Totals
Premium	$57,577.62							
Registration Fees	27,340.81							
Exchange	4,232.60							
Interest	1,043,968.56							
Fees		$678,583.99	$151,325.17	$226,227.09	$355,275.22	$27,332.58	$1,102,739.33	
Rentals								
Total	$1,130,119.59	$678,583.99	$151,325.17	$226,227.09	$355,275.22	$27,332.58	$1,102,739.33	
Expenses								
Advertising	$2,656.72	$3,757.22		$3,173.04	$3,657.25			
Insurance	1,922.25	816.99		920.13	1,021.22	$712.54	$2,093.93	

[fol. 365]

Rent	51,750.12	56,400.00	$18,000.00	30,000.00	15,600.00	9,600.00	40,000.00	
Salaries	151,419.15	229,713.26	88,930.70	60,544.94	30,463.04	8,808.00	184,727.59	
Shorts & Over	482.01	100.00		77.00				
Stationery	32,126.44	31,271.72	9,482.17	12,543.86	9,758.24	2,700.57		
Taxes	92,572.06	56,350.00		19,540.00	31,810.00		353,626.00	
Recording		13,920.74						
Searches			19,714.05					
Repairs & Supplies							178,505.03	
Totals	$332,928.75	$392,329.93	$136,126.92	$126,798.97	$92,309.75	$21,821.11	$758,952.55	$1,861,267.98
Net Earnings	$797,190.84	$286,254.06	$15,198.25	$99,428.12	$262,965.47	$5,511.47	$343,786.78	$1,810,334.99

Profit and Loss

Dividends	$855,000.00	Balance	$802,376.05
Losses:			
T. & C.	1,741.97	Net Earnings	1,810,334.99
		Profit on Sales	305.59
	$856,741.97		
Balance	$1,756,274.66		
	$2,613,016.63		$2,613,016.63

Note: Balance Sheet as of Sept. 30, 1923 carries an account shown as "Plant" $275,000.00

[fol. 366]

Exhibit "D-1"—Continued

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1924

Income	Financial Dept.	Title & Conveyancing Dept.	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Acct. Dept.	Totals
Premium	$8,407.12							
Registration Fees	24,029.16							
Exchange	1,456.08							
Interest	1,122,759.79	$25.00						
Fees		558,457.63	$147,184.11	$235,655.95	$319,725.03	$27,048.47	$1,061,465.98	
Rentals								
Totals	$1,156,652.15	$558,482.63	$147,184.11	$235,655.95	$319,725.03	$27,048.47	$1,061,465.98	
Expenses								
Advertising	$2,820.39	$4,731.95		$3,182.09	$4,738.24			
Insurance	2,101.41	1,904.84		2,108.19	361.49		$2,656.43	
Rent	53,404.43	56,400.00	18,000.00	30,000.00	15,600.00	$9,600.00	40,000.00	
Salaries	169,032.85	234,716.15	99,127.14	60,427.16	32,764.83	8,719.67	193,803.19	

[fol. 367]

Shorts & Overs	212.70							
Stationery	30,182.15	28,200.79	12,810.41	12,786.06	9,589.27	869.68		
Taxes	104,952.81	51,260.00		24,426.45	27,390.00		358,123.48	
Recording		10,020.09						
Searches			13,890.46					
Repairs & Supplies							185,916.15	
Totals	$362,706.74	$387,233.82	$143,828.01	$132,929.95	$90,443.83	$19,189.35	$780,499.25	$1,916,830.95
Net Earnings	$793,945.41	$171,248.81	$3,356.10	$102,726.00	$229,281.20	$7,859.12	$280,966.73	$1,589,383.37

Profit and Loss.

Dividends	$900,000.00	Balance	$1,756,274.66
Transfer to Surplus	1,000,000.00	Profit on Sales	9,348.75
Losses:		Net Earnings	1,589,383.37
T. & C.	2,500.08		
	$1,902,500.08		
Balance	$1,452,506.70		
	$3,355,006.78		$3,355,006.78

Note: Balance Sheet carried an account as of Sept. 30, 1924 "Plant" $275,000.00

[fol. 368]

EXHIBIT "D-1"—Continued

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1925

Income	Financial Dept.	Title and Conveyancing Dept.	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Acct. Dept.	Totals
Premium	$6,608.45							
Registration Fees	31,033.62							
Exchange	1,551.93							
Interest	1,087,811.66							
Fees		$564,331.83	$143,035.30	$209,842.60	$314,392.26	$27,207.54	$918,385.25	
Rentals								
Totals	$1,127,005.66	$564,331.83	$143,035.30	$209,842.60	$314,392.26	$27,207.54	$918,385.25	
Expenses								
Advertising	$3,583.88	$4,689.24		$5,000.47	$3,863.14			
Insurance	2,885.00	1,355.83		2,760.08	1,619.94		$24,182.98	
Rent	52,975.44	56,400.00	$18,000.00	30,000.00	15,600.00	$9,600.00	40,000.00	
Salaries	179,410.61	244,330.37	96,287.65	64,574.07	31,686.50	8,193.00	209,646.79	

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Shorts & Overs	244.03							
Stationery	27,901.62	22,794.48	8,337.79	10,939.55	9,212.55	984.85		
Taxes	110,196.04	13,860.00		7,430.00	16,360.00		271,385.97	
Recording		10,984.99						
Searches			14,966.43					
Repairs & Supplies							192,020.18	
Totals	$377,196.62	$354,414.91	$137,591.87	$120,724.17	$78,342.13	$18,777.85	$737,235.92	$1,824,283.47
Net Earnings	$749,809.04	$209,916.92	$5,443.43	$89,118.43	$236,050.13	$8,429.69	$181,149.33	$1,479,916.97

Profit and Loss.

Dividends	$900,000.00	Balance	$1,452,506.70
Losses & T. & C.	2,841.19	Net Earnings	1,479,916.97
	$902,841.19		
Balance	$2,029,582.48		
	$2,932,423.67		$2,932,423.67

Note: Balance Sheet as of Sept. 30, 1925 carries an account "Plant" $275,000.00

[fol. 370]

EXHIBIT "D-1"—Continued

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1926

Income	Financial Dept.	Title and Convey-ancing	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Acct. Dept.	Totals
Premiums	$19,250.29							
Registration Fees	46,099.41							
Exchange	2,125.09							
Interest	1,179,444.97							
Fees		551,168.01	$166,027.21	$343,920.54	$234,421.39	$27,152.45	$917,060.09	
Rentals								
Totals	$1,246,919.76	$551,168.01	166,027.21	343,920.54	234,421.39	27,152.45	917,060.09	
Expenses								
Advertising	2,773.71	5,013.97		3,874.28	4,944.16			
Insurance	3,856.96	1,461.18		3,001.72	1,649.96		2,821.45	
Rent	53,542.10	56,400.00	18,541.70	30,000.00	15,600.00	9,600.00	40,000.00	
Salaries	185,894.91	249,698.85	99,580.60	69,979.40	36,195.65	9,308.00	211,915.52	

[fol. 371]

Shorts & Over	365.75							
Stationery	41,766.76	32,785.25	33,415.00	14,792.65	10,529.83	1,074.90		
Taxes	153,620.80	26,180.00		13,240.00	31,880.00		281,080.83	
Recording		12,711.85						
Searches			12,114.28					
Repairs, Supplies							199,065.50	
Totals	$441,820.99	384,251.10	163,651.58	134,888.05	100,799.60	$19,982.90	$734,883.30	$1,980,277.52
Net Earnings	$805,098.77	166,916.91	2,375.63	209,032.49	133,621.79	$7,169.55	$182,176.79	$1,506,391.93

Profit and Loss

Dividends	$900,000.00	Balance	$2,029,582.48
Claims	10,000.00	Profit on Sales	220.00
Losses:			
T. & C.	20,501.87	Net Earnings	1,506,391.93
	930,501.87		
Balance	1,605,692.54		
	$3,536,194.41		$3,536,194.41

Note: Balance Sheet as of Sept. 30, 1926, carried an account "Plant" $275,000.00

[fol. 372]

EXHIBIT "D-1"—Continued

Annual Operating Statement—Land Title & Trust Co.

Fiscal Year Ended Sept. 30, 1927

Income	Financial Dept.	Title and Conveyancing	Plant	Trust Dept.	Real Estate Dept.	Safe Deposit Dept.	Building Acct. Dept.	Total
Premium	$6,007.00							
Registration Fees	39,025.81							
Exchange	4,644.39							
Interest	1,060,484.57							
Fees	70.00	442,222.70	$114,384.33	$301,915.03	$198,640.93	$25,576.96		
Rentals							$946,041.14	
Totals	$1,110,231.77	442,222.70	$114,384.33	$301,915.03	$198,640.93	$25,576.96	$946,041.14	
Expenses								
Advertising	$3,299.81	$4,109.32		$5,163.41	$3,468.30			
Insurance	2,910.72	1,515.11		2,959.68	1,848.18	$97.28	$2,533.63	
Rent	53,875.44	56,400.00	$18,650.04	30,000.00	15,600.00	9,700.00	29,200.00	
Salaries	196,957.02	258,021.50	114,904.37	77,629.22	40,358.12	8,318.04	215,371.49	
Shorts & Over								
Stationery	34,365.39	26,700.58	22,124.69	15,377.21	12,509.61	878.96		
Taxes	140,066.67	21,400.00		10,700.00	26,200.00		264,902.58	
Recording		8,516.36						
Searches			12,142.72					

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Repairs, Supplies							165,155.32	
Totals	$431,475.05	$376,662.87	$167,821.82	$141,829.52	$99,984.21	$18,994.28	$677,163.02	$1,913,930.77
Net Earnings	$678,756.72	$65,559.83*	$53,437.49	$160,085.51	$98,656.72	$6,582.68	$268,878.12	$1,225,082.09

Profit and Loss.

Dividends	$900,000.00		
Bldg. Improvement	740,000.00		
Losses:			
T. & C.	6,073.11	Balance	$1,605,692.54
Certificates	25,000.00	Profit in Suspense:	
Contribution		Interest	85,000.00
(Miss Flood)	2,500.00	Real Estate Fee	110,000.00
Loss:		Increase of Bldg.	
Suit Gaschott & Co.	434,367.05	Value	1,100,000.00
Reserve for Completion		Profit on Sale of	
of Elevator	120,632.95	Sec	7,906.25
		Net Earnings	1,225,082.09
	$2,228,573.11		
Balances	$1,905,107.77		
	$4,133,680.88		$4,133,680.88

Note: Balance Sheet as of Sept. 30, 1927 carries an account in the column "Plant" $275,000.00

EXHIBIT "D-1"—Continued

[fol. 374]

Statement for Month of Oct., 1927

Land Title & Trust Co.

Receipts	Financial	T. & C.	Plant	Trust	Safe Deposit	Real Estate	Building	Total
Total	$74,051.06	$13,668.85	$8,239.65	$24,964.62	$2,417.81	$5,055.91	$75,378.13	$203,776.03
Payments								
Total	$34,391.70	$29,787.87	$12,941.39	$12,152.97	$1,544.14	$6,706.88	$57,317.95	$154,842.90
Earnings for Mo.		*$16,119.02	*$4,701.74					$48,933.13

Assets & Liabilities (Oct. 31, 1927)

Cash	$4,339,652.52	Capital	$3,000,000.00	
Legal Securities	250,000.00	Surplus	4,909,000.00	
Loans	24,742,994.52	Profit & loss	2,541,566.87	
Investments	5,750,468.31	Net Earnings for Period	48,933.13	$10,500,000.00
Real Estate	279,347.58			
Plant	800,000.00	Deposit	25,694,142.10	
Accounts	525,108.18	C. H. Due Bills	221,062.33	
		Other Liabilities	272,366.68	26,187,571.11
Total	$36,687,571.11			$36,687,571.11

* These figures are circled.

[fol. 375]

It should be noted that the Plant account is written up to $800,000.00. This no doubt is due to the fact that negotiations were made for the merger and in accordance with the contract the Plant account was placed at a value of $800,000.00.

Analysis of Plant and T. & C. Accts.

	Plant	T. & C.
Fees	$8,239.65	$13,668.85
Expenses		
Advertising		308.43
Recording		237.87
Rent	1,554.47	
Salaries	9,223.44	21,156.65
Searches	1,147.65	
Stationery	916.13	2,184.92
Taxes		1,200.00
Total Expenses	$12,941.39	$29,787.87
Def.	*$4,701.74	*$16,119.02

* These figures are circled.

[fol. 376]

EXHIBIT "D-1"—Continued

Land Title & Trust Co.

Earnings of T. & C. Dept. and Plant—Sept. 30, 1921 to Oct. 31, 1927

† Fy 9/30/21	Fy 9/30/21	Fy 9/30/22	Fy 9/30/23	Fy 9/30/24	Fy 9/30/25	Fy 9/30/26	Fy 9/30/27	Month of Oct. 1927
Income:								
T. & C.	$414,309.92	$580,683.70	$678,583.99	$558,482.63	$564,331.83	$551,168.01	$442,222.70	$13,668.85
Plant	81,242.25	111,207.49	151,325.17	147,184.11	143,035.30	166,027.21	114,384.33	8,239.65
Total	$495,552.17	$691,831.19	$829,909.16	$705,666.74	$707,367.13	717,195.22	$556,607.03	$21,908.50
Expenses:								
T. & C.	$321,692.85	$325,763.81	$392,329.93	$387,233.82	$354,414.91	$384,251.10	$376,662.87	$29,787.87
Plant	92,979.17	111,594.13	136,126.92	143,828.01	137,591.87	163,651.58	167,821.82	$12,941.39
Total	$414,942.02	$437,357.94	$528,456.85	$531,061.83	$492,006.78	$547,902.68	$544,484.69	$42,729.26
Net Earnings:								
T. & C.	$92,347.07	254,859.89	$286,254.06	$171,248.81	$209,916.92	$166,916.91	$65,559.83	*$16,119.02
Plant	*11,736.92	*386.64	15,198.25	3,356.10	5,443.43	2,375.63	*53,437.49	*4,701.74
Total	$80,610.15	$254,473.25	$301,452.31	$174,604.91	$215,360.35	$169,292.54	$12,122.34	*$20,820.76

† Struck out.

* These figures are circled.

[fol. 377]

Exhibit "D-2"

*Record of Land Title Applications

	Date	Total
0*	1885	$339
399.00	1886	1,746
1,746.00	1887	1,736
1,736.00	1888	2,353
2,353.00	1889	2,339
2,339.00	1890	2,640
2,640.00	1891	2,391
2,391.00	1892	2,807
2,807.00	1893	2,694
2,694.00	1894	3,137
3,137.00	1895	3,324
3,324.00	1896	3,439
3,439.00	1897	4,067
4,067.00	1898	3,495
3,495.00	1899	4,050
4,050.00	1900	4,151
4,151.00	1901	5,874
5,874.00	1902	5,346
5,346.00	1903	6,003
6,003.00	1904	8,508
8,508.00	1905	8,378
8,378.00	1906	9,765
9,765.00	1907	8,681
8,681.00	1908	7,479
7,479.00	1909	9,048
9,048.00	1910	9,603
9,603.00	1911	9,424
9,424.00	1912	11,646
11,646.00	1913	9,190

[fol. 378]

770.00
731.00

$145,964.00*

	Date	Total
	1913	9,190
	1914	9,227
	1915	9,910
	1916	13,925
	1917	9,677
	1918	9,930
	1919	18,439
	1920	15,011
	1921	9,937
	1922	18,855
	1923	19,028
	1924	15,094
	1925	16,517
	1926	13,283
	1927 (to Oct.31, 1927)	9,740

EXHIBIT "D-3"

Real Estate Title Insurance & Trust Co.

Year	Number of Applications	Year	Number of Applications
1876	9	1903	4,705
1877	346	1904	5,482
1878	201	1905	6,771
1879	401	1906	8,735
1880	647	1907	8,564
1881	975	1908	7,511

[fol. 379]

Year	Number of Applications	Year	Number of Applications
1882	1,190	1909	9,412
1883	1,631	1910	9,522
1884	2,077	1911	11,421
1885	2,696	1912	9,456
1886	3,575	1913	9,844
1887	3,772	1914	11,330
1888	4,371	1915	12,629
1889	5,195	1916	13,389
1890	5,408	1917	12,465
1891	3,740	1918	13,538
1892	3,278	1919	23,810
1893	3,247	1920	19,407
1894	3,062	1921	14,660
1895	3,415	1922	24,997
1896	3,590	1923	30,977
1897	3,929	1924	26,074
1898	3,262	1925	29,032
1899	3,450	1926	23,495
1900	3,542	1927 to and including October 31st	15,607
1901	3,416		
1902	3,727		

Real Estate Land Title and Trust Company

Year	Number of applications
1927—Nov. 1, 1927 to Dec. 31, 1927	4,054
1928	21,085
1929	14,971
1930	10,132
1921	10,416
1932	7,592
1933—to Date	4,555 11 mos.

[fol. 380]

EXHIBIT "D-4"

Land Title & Trust Co.—Fy, 9/30/09

No. of Title & Consignee Applications Made—

Oct.	1908	659	1909	926	1910	919	1911	788		1003
Nov.		564		989		840		825		880
Dec.		551		603		796		947		663
Jan.	1909	542	1910	529	1911	568	1912	848	1913	770
Feb.		1049		754		969		1034		731
Mch.		710		878		954		1405		861
Apr.		733		1036		877		1063		856
May		764		927		903		1208		794
June		602		885		754		1212		816
July		866		792		650		1080		646
Aug.		481		714		665		747		679
Sept.		710		857		617		811		704
Total		8231		9890		9512		11968		9403

[fol. 381] IN UNITED STATES DISTRICT COURT

ORDER SEALING BILL OF EXCEPTIONS—Filed October 13, 1937

And thereupon counsel for the said defendant did then and there except to the rulings of said Court on questions of evidence propounded during the course of the trial, and requested that the seal of the Judge aforesaid should be put thereto, which was done according to the form of the statute in such case made and provided.

And thereupon counsel for the said defendant did then and there except to the aforesaid opinion of the said Court, and tenders this Bill of Exceptions to the rulings of said Court, and requests that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendant, in pursuance of Orders of Court extending the term and times for filing bill of exceptions up to October 13, 1937 (Pages 130, 131, 132) and in conformity with Rule 10 of the Law Rules of Practice of the District Court of the United States for the Eastern District of Pennsylvania, which reads as follows:

"4. For the purpose of taking any action which must be taken within the term of the Court at which final judgment or decree is entered, each term of Court is extended for ninety (90) days from the date of entry of final judgment or decree."

did put his seal to this Bill of Exceptions this 11th day of October, A. D. 1937.

Welsh, J.

[fol. 382] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 28, 1937

The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above entitled cause, requests the learned Trial Judge to make the following Findings of Fact:

1. The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above-entitled proceeding, is a corporation organized and existing under and by virtue of

the laws of the Commonwealth of Pennsylvania, with its principal office at the southwest corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania. (Stipulation Par. 1).

2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795), plaintiff-petitioner herein, on January 15, 1929, filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928, in which the amount of net income reported by the plaintiff-petitioner was $2,551,776.91, upon which amount of net income there was shown due on the said return for the said fiscal year Federal income tax in the amount of $312,592.67. (Stipulation Pars. 2 and 3).

3. The said amount of Federal income tax, namely, [fol. 383] $312,592.67, shown due as aforesaid for the fiscal year ending October 31, 1928, was assessed against the said The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, and was paid by the said The Real Estate-Land Title and Trust Company to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following instalments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

(Stipulation Par. 4).

4. An additional income tax in the amount of $865.06 was assessed against plaintiff-petitioner by the Commissioner of Internal Revenue based upon a taxable net income determined by said Commissioner to be $2,558,838.64 for the plaintiff-petitioner's fiscal year ending October 31, 1928, which said additional tax of $865.06, with interest thereon amounting to $83.31, was paid by plaintiff-petitioner to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, on September 3, 1930 (Stipulation Pars. 5 and 6).

5. The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, was formed by the consolida-

tion and merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company in accordance with the terms of an agreement entered into by said three companies and [fol. 384] a majority of the Directors of each of them under date of October 3, 1927 (Stipulation Pars. 7 and 8).

6. The agreement of consolidation and merger was ratified by the stockholders of the three corporations, parties thereto, and a charter issued to the plaintiff-petitioner by the Governor of Pennsylvania on October 31, 1927. The Directors of the plaintiff-petitioner held their organization meeting at 3:15 P. M. on October 31, 1927 and the plaintiff-petitioner opened for business on November 1, 1927 (Stipulation Pars. 9 and 10).

7. All of the capital stock of the said The Real Estate-Land Title and Trust Company was issued to the former stockholders of the three merging corporations in consideration for the assets of said corporations acquired by the said The Real Estate-Land Title and Trust Company, including the title plant of the Land Title and Trust Company, so that the entire interest and control in such property remained in the same persons (Stipulation Par. 11).

8. The Real Estate-Land Title and Trust Company, plaintiff-petitioner, engages, inter alia, in the title insurance business, including searches and insurance of titles of real estate.

9. The said title plant formerly owned by the Land Title and Trust Company was acquired by it during the years 1886 and 1887 at a cost of $251,509.84. Additions to said plant were made in the years 1888, 1889 and 1890 at a cost of $24,541.78. From 1890 to February 28, 1913 at least $317,645.36 was expended in maintaining the said title plant and keeping in up to date; which materially increased [fol. 385] the value of the said title plant (Stipulation Par. 13).

10. Each of the title plants formerly owned by the said Land Title and Trust Company and the said Real Estate Title Insurance and Trust Company was taken into the merger at a valuation of $800,000 (Stipulation Par. 11).

11. No deduction was ever claimed by or allowed to the said Land Title and Trust Company for income tax pur-

poses for depreciation, wear and tear, obsolescence, amortization or depletion on the said title plant formerly owned by the said Land Title and Trust Company up to and including October 31, 1927, the date of the merger (Stipulation Par. 18).

12. No deduction has ever been allowed to the plaintiff-petitioner for income tax purposes on account of depreciation, wear and tear, obsolescence, amortization, depletion or abandonment of the said title plant formerly owned by the said Land Title and Trust Company (Stipulation Par. 19).

13. The negotiations for the merger were first taken up by the West End Trust Company and the Real Estate Title Insurance and Trust Company and they had agreed on a two-company merger before the Land Title and Trust Company was considered as a party to the merger, which was not until the latter part of September 1927, about two weeks before the merger agreement was signed (Testimony page 19).

14. When the merger agreement was signed, there was no definite plan about the disposition of the title plants then owned by the Land Title and Trust Company and the [fol. 386] Real Estate Title Insurance and Trust Company. (Testimony page 21).

15. The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927 (Testimony pages 23-4).

16. No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October 1927. To keep the plant up to date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927 and ending October 31, 1928. (Testimony page 152).

17. After the merger agreement was executed, an examination of the title plants of the Land Title and Trust Company and the Real Estate Title Insurance and Trust Company was made to determine the best use to make of the plants and to see whether they might be used together (Testimony page 21).

18. Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company. (Testimony pages 58 and 142).

19. After said investigation, it was determined that the plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Testimony pages 5, 6, and 8).

[fol. 387] 20. The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November 1927 (Testimony page 66).

21. About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed.

22. Negotiations were carried on for the sale of the title plant formerly owned by the Land Title and Trust Company with the Bankers Trust Company of Philadelphia as a prospective purchaser in the early part of 1928 and a price of $1,000,000 was put on the plant by Mr. J. Willison Smith, President of the plaintiff-petitioner, but the negotiations fell through and no offer for the said title plant was ever received by the plaintiff-petitioner in any amount. (Testimony pages 25-6.)

23. The said title plant formerly owned by the Land Title and Trust Company was abandoned by the plaintiff-petitioner during its fiscal year commencing November 1, 1927, and ending October 31, 1928.

24. The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during [fol. 388] the plaintiff's fiscal year commencing November 1, 1927 and ending October 31, 1928, and became obsolete on or before October 31, 1928.

25. The fair market value on March 1, 1913, of the said title plant formerly owned by the Land Title and Trust Company was not less than $1,000,000 (testimony page 148—Mecutchen). The fair market value on March 1, 1913, of the said title plant formerly owned by the Land Title and Trust Company was $1,250,000 (testimony page 101—Robbins).

26. The fair market value on October 31, 1928, of the said title plant formerly owned by the said Land Title and Trust Company was not more than $125,000 (testimony page 148—Mecutchen). The fair market value on October 31, 1928, of the said title plant formerly owned by the said Land Title and Trust Company was $100,000 (Testimony page 103—Robbins).

27. The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and the fair market value of said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount not less than $875,000 (Testimony of Mecutchen supra). The plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000 (testimony of Robbins supra).

28. On or about December 12, 1930, plaintiff-petitioner [fol. 389] herein filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claim for refund of Federal income tax for the fiscal year ending October 31, 1928, in the amount of $153,125.00 on Form 843, alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the said title insurance plant (formerly owned by the Land Title and Trust Company) during the said fiscal year (Stipulation Par. 20).

29. The then Commissioner of Internal Revenue refused to refund to plaintiff-petitioner herein the said amount of $153,125.00, or any other amount for the fiscal year ending October 31, 1928, and on the 20th day of February 1931 the then Commissioner of Internal Revenue disallowed the said claim for refund filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928 (Stipulation Par. 21).

30. This action was brought for the recovery of Federal income tax, which income tax is an internal revenue tax and was collected by Joseph S. McLaughlin as Collector of Internal Revenue for the First District of Pennsylvania, the said Joseph S. McLaughlin having been Collector of Internal Revenue for the First District of Pennslyvania at the times of the payment of the income tax and interest, for the recovery of which this proceeding was instituted. The said Joseph S. McLaughlin was dead at the time this proceeding was commenced and therefore not in office as Collector of Internal Revenue at such time, and no part of the said in- [fol. 390] come tax or interest, for the recovery of which this proceeding was instituted, was paid to the Collector of Internal Revenue for the First District of Pennsylvania who was in office at the time this proceeding was commenced (Stipulation Par. 22).

31. This proceeding was commenced after the passage of the Revenue Act of 1921, for the recovery of an internal revenue tax alleged by plaintiff-petitioner to have been erroneously and illegally assessed and collected. This suit was brought within six years after the right accrued for which claim is made in this proceeding (Stipulation Par. 23).

Conclusions of Law

1. The merger and consolidation of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company was effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the 3rd day of May A. D. 1909, P. L. 408, and supplements thereto.

2. The merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company on October 31, 1927, was a transaction in which no gain or loss to any of the said Companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act of Congress properly applicable thereto (Stipulation Par. 17).

3. No deduction was properly allowable to the Land Title and Trust Company for income tax purposes at any time prior to the merger of October 31, 1927, on account of depre- [fol. 391] ciation, wear and tear, obsolescence, amortization or depletion on the title plant formerly owned by the said

Land Title and Trust Company and acquired by the plaintiff-petitioner upon the merger.

4. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927, and ending October 31, 1928, all losses sustained by it during said year not compensated for by insurance or otherwise.

5. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927, and ending October 31, 1928, a reasonable allowance for the obsolescence of any of its assets used in its business.

6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company.

7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company.

[fol. 392] 8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928.

9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000.

10. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of

Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the amount of $1,150,000.

11. Counsel for plaintiff-petitioner shall calculate and submit to the Trial Judge the amount of refund of income tax to which the plaintiff-petitioner is entitled under the above findings, and thereafter a judgment or decree shall be entered in favor of the plaintiff-petitioner and against the defendant for the amount of income tax properly refundable to the plaintiff-petitioner for its fiscal year ending October 31, 1928, with interest thereon as allowed by law.

Saul, Ewing, Remick & Saul, By Joseph Neff Ewing,
Attorneys for Plaintiff-Petitioner.

[fol. 393] IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 6, 1937

The defendant, considering the facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, requests the Court to find the same as follows:

That it find the facts as stipulated between the parties, and in addition thereto, the following facts taken from the stipulation and the testimony of the witnesses and other evidence adduced at the trial:

I

That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, upon the merger, in addition to being designed and used by the respective former owners for the same general purpose, were duplicates, and the title search plants of each included the same information; and they were two of the three most complete and extensive title insurance plants existing in the City of Philadelphia at the date of the merger on October 31, 1927.

II

That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as a result of the said merger and/or consolidation, con-

[fol. 394] sisted of two parts, namely (1) abstracts of title of the public records of Philadelphia County, including deeds, mortgages, sheriffs' deeds, assignments, releases, etc., all indexed, plotted and located on plans of the City as subdivided into sections and blocks, and (2) separate abstracts of title, searches and opinions in each matter for which the company issued its title insurance policy, or obligations of such nature.

III

That for the purposes of the merger and/or consolidation the value placed thereon at $800,000.00 each included both the complete plants, as defined in the foregoing paragraph, and it is not contended by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, nor does the evidence indicate that the second part, namely, separate abstracts of title, searches and opinions in each matter for which the former company issued its title insurance policy, or obligation of such nature, was abandoned or otherwise, but the testimony shows that this part of both title insurance plants was used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, during the fiscal period beginning November 1, 1927, and ending October 31, 1928; and it is that part of the title insurance plant commonly called "title search plant" and formerly owned by The Land Title and Trust Company which The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contends was abandoned and became obsolescent during the fiscal period beginning November 1, 1927, and ending on October 31, 1928.

[fol. 395]

IV

That prior to the merger and/or consolidation and the organization on the 31st day of October, 1927, and the opening for business on November 1, 1927, of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, all of the parties thereto knew that only the Real Estate Title Insurance and Trust Company's search plant would be used in its business, and the determination to store the title search plant of The Land Title and Trust Company was arrived at during the month of October, 1927, and immediately thereafter and during said month posting of the records of the said plant was discontinued, and the officers and directors of The Land Title and Trust Company immedi-

ately proceeded to store these records, the greater part of which was done during the month of October, 1927, and completed immediately thereafter.

V

That after the merger and/or consolidation and the issuance of letters patent to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, on October 31, 1927, the title search plant of The Land Title and Trust Company was no longer used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, in any manner relative to the search of the public records or the abstracting of titles, and no further posting of the books of The Land Title and Trust Company's search plant was done or in any manner kept up-to-date by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, from the date [fol. 396] of the commencement of business on November 1, 1927, or otherwise used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner.

VI

That although the title search plant of The Land Title and Trust Company was never advertised for sale and no honest effort was made to dispose of it by sale, upon inquiry by interested parties, the president of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, sometime during the early part of 1928, placed a tentative price thereon of $1,000,000.00, which was in excess of the value placed upon the complete title insurance plant for the purposes of the merger; and, although the testimony of The Real Estate-Land Title and Trust Company's witnesses was that there was a great amount of goodwill in the title insurance business attributable to applications, separate abstracts of title, searches and opinions, briefs of title and the possession of a complete title search plant in connection with the title insurance business, it did not segregate or show the amount of this goodwill and prestige value.

VII

That the information and other data contained in the title search plant of The Land Title and Trust Company, stored by The Real Estate-Land Title and Trust Company's predecessor in October, 1927, was as valuable and essentially

the same at the end of the fiscal period ended October 31, [fol. 397] 1928, as it was on October 31, 1927, the date of the organization of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, and prior to the opening for business on November 1, 1927, and if brought down to date at the end of the fiscal year of plaintiff-petitioner on October 31, 1928, it would be essentially the same complete title plant as it was prior to the date upon which The Land Title and Trust Company ceased to post the books; that the expense of bringing a complete title search plant, such as that formerly possessed by The Land Title and Trust Company, down to date for the twelve-month period in the City of Philadelphia, ended October 31, 1928, would not exceed $75,000.00.

VIII

That the officers and directors of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, were former directors and officers of the three merging companies and as such had wide experience in the title insurance business and the conduct of title search plants in the City of Philadelphia; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, knew—and the facts clearly show—that prior to its organization one of the title search plants acquired by it as a result of the merger would not be used in its business, and although The Real Estate-Land Title and Trust Company, plaintiff-petitioner, has not indicated for what purpose the duplicate plants were acquired, the facts and circumstances clearly indicate that the acquisition of the two plants would give to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, a greater amount of business in the City of Philadelphia than it [fol. 398] otherwise would have, since it is admitted that upon the consolidation and merger there remained only one other complete title search plant in the City of Philadelphia, and would result in the retaining of the same amount of business as was theretofore done by two separate plants, with the advantage of the reduction in cost of operation of only one title search plant, which clearly shows that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was compensated by increased business and lessened cost on account of the non-user of the title search plant of the former The Land Title and Trust Company.

IX

The title search plant of the former The Land Title and Trust Company, which was never used by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contained the same information that was contained in any complete title search plant in the City of Philadelphia, and upon the date of the merger and/or consolidation of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, it was essentially as valuable as that of the other title search plant taken into the merger, as is evidenced by the value placed thereon, and on October 31, 1928, there was no diminution in the information contained therein though not in use for a period of twelve months, and was essentially as valuable for the purpose for which it was constructed, in regard to title insurance, up to and including the date on which its books ceased to be posted. From all of which it may be reasonably concluded that the acquisition of the title search plant by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was not for [fol. 399] Trust Company, plaintiff-petitioner, was not for the purpose of use in the business.

X

The complete title insurance plant of The Land Title and Trust Company was carried on the books of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as an asset account without diminution in value other than the sum of $50,000.00 sought to be taken as a deduction in its return of income for the period ended October 31, 1928.

XI

That any loss attributable to a particular year for obsolescence or otherwise is a loss occurring by reason of something happening in that year; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, did not use the title search plant of the former The Land Title and Trust Company during the year under review.

If the alternative the Court should find that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, is entitled to any deduction on account of obsolescence, defendant requests that it be permitted to submit supplemental requests for findings on the question of the amount deductible, if any.

From all of which the Court is requested to make the following——

[fol. 400] Conclusions of Law

I

That there is no authority in any statute permitting deductions for obsolescence of property which was not used in the trade or business during the taxable year.

II

That the statute contemplates a reasonable allowance for obsolescence of tangible property used in the trade or business where the property is a wasting asset, but the information contained in a title search plant that it is not of such character as contemplated by the applicable statutes on obsolescence.

III

That the acquisition of the title search plant of The Land Title and Trust Company by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was a capital transaction resulting in a permanent benefit to plaintiff-petitioner, through the elimination of competition, an added goodwill and the handling of the combined business at a reduction of operating cost.

IV

That the intangible goodwill value to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, on account of the possession of the title search plant of The Land Title and Trust Company is not subject to obsolescence.

[fol. 401] V

That The Real Estate-Land Title and Trust Company, plaintiff-petitioner, is not entitled to recover.

VI

That judgment should be for the defendant.

Charles D. McAvoy, United States Attorney. By Thomas J. Curtin, Assistant United States Attorney. Lester L. Gibson, Special Assistant to the Attorney General.

IN UNITED STATES DISTRICT COURT

PETITION TO WITHDRAW BILL OF EXCEPTIONS AND REQUEST FOR EXRENSION OF TIME FOR FILING NEW BILL—Filed June 11, 1937

Comes the defendant, the United States of America, by its attorney, J. Cullen Ganey, Jr., United States Attorney, by Thomas J. Curtin, Assistant United States Attorney, and petitions the Honorable George A. Welsh, Judge of the United States District Court for the Eastern District of [fol. 402] Pennsylvania before whom the above-entitled cause was tried and judgment thereon entered in favor of the plaintiff on March 31, 1937, to withdraw the bill of exceptions which was settled and filed on May 14, 1937, and requests that the term be extended at least forty days for the filing of a new bill of exceptions, and for reasons therefor, states:

1. That the bill of exceptions as now settled and filed contains much redundant and irrelevant matter which in no way relates to the issues to be presented to the appellate court in this case.

2. That the transcript of the testimony can be shortened by reducing to narrative form and eliminating that portion thereof which does not relate to the issue or issues presented to the appellate court.

3. That the Solicitor General has not at this date determined whether an appeal shall be taken from the decision of this Court, or whether an appeal shall be taken as to one of the questions presented to this Court or as to all of the questions presented, and at this time it is not possible to determine what portion of the record should be eliminated from the bill of exceptions and what portion should be retained therein.

The Court is Therefore Respectfully Petitioned and Requested to enter an order withdrawing the bill of exceptions as now settled and filed, and to grant an extension of the term for filing and settling a new bill of exceptions for at [fol. 403] least forty days from the date of the expiration of the present term of this Court.

Respectfully submitted,

J. Cullen Ganey, Jr., United States Attorney.
Thomas J. Curtin, Assistant United States Attorney.

Order thereon

And now, to wit, June 11, 1937, the prayer of the within petition is granted.

Welsh, J.

[fol. 404] IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME FOR FILING AND SETTLING BILL OF EXCEPTIONS—Filed July 14, 1937

Comes the defendant, the United States of America, by its attorney, J. Cullen Ganey, Jr., United States Attorney, by Thomas J. Curtin, Assistant United States Attorney, and petitions the Honorable George A. Welsh, Judge of the United States District Court for the Eastern District of Pennsylvania before whom the above-entitled cause was tried and judgment thereon entered in favor of the plaintiff on March 31, 1937, for additional time within which to file and settle the bill for exceptions, and for reasons states:

1. That on or about the 11th day of June, 1937, an order was made extending the term within which this cause was decided to and including July 24, 1937, for the purpose of settling and filing the bill of exceptions.

2. That at the time of the making of the above order it had not been determined by the Solicitor General of the United States whether an appeal would be taken from the judgment of the Court in favor of the plaintiff, and it was not until June 23, 1937, that it was finally determined to appeal from the said judgment.

3. That shortly after the determination to appeal from your Honor's decision, preparation was started upon a bill of exceptions, with the view of filing and settling the same [fol. 405] prior to the date as extended above, but it has been ascertained that your Honor—on or about July 1—proceeded to Bermuda, West Indies, for a vacation and will not return until sometime after September 1, 1937.

4. That it is impracticable to proceed to the West Indies to present the bill to your Honor for settling, and since under the law the Judge who tried the case is the sole and only person who may settle the bill—

The Defendant Respectfully Petitions and Moves that your Honor make an order extending the term of the Court for a period of at least fifty days from the date of the expiration of the term as heretofore extended, for the purpose of filing and settling the bill of exceptions.

Respectfully submitted,

J. Cullen Ganey, Jr., United States Attorney.
Thomas J. Curtin, Assistant United States Attorney.

[fol. 406] IN UNITED STATES DISTRICT COURT

Testimony Taken May 14, 1937

Before Hon. George A. Welsh, J.

Philadelphia, Pa., Friday, May 14, 1937

Present: Saul, Ewing, Remick and Saul, Esqs., by Joseph A. Lamorelle, Representing the Plaintiff. Thomas J. Curtin, Esq., Assistant United — District Attorney, and Lester L. Gibson, Esq., Representing the Defendant.

Mr. Curtin: If Your Honor please, in the case of Real Estate-Land Title and Trust Company against the United States we are going to ask Your Honor for leave to amend the bill of exceptions to include the exhibits.

The Court: Are you going to prepare an amendment, or is the amendment already prepared?

Mr. Gibson: It has not been prepared, Your Honor.

The Court: I don't know what the Exhibits are, but I would like the Supreme Court to get the benefit of everything that throws any light on the question.

[fol. 407] Mr. Gibson: Your Honor, this is our idea—I believe Mr. Lamorelle agrees—there has been an objection to our failure to include a stipulation of fact and the exhibits.

We make the suggestion that that is part of the primary record, but possibly it is the best practice to include them in the Bill of Exceptions.

The Court: I would like the stipulation of fact to be fully set forth, because it is the basis of everything.

Mr. Gibson: On that account we are coming before Your Honor now and requesting permission to amend our Bill of

Exceptions, and we would like to have Your Honor order that.

The Court: Yes, that may be done. Prepare the amendment and I will take it up.

Mr. Curtin: We will prepare an order and have the Clerk sign it allowing us to file an amended bill.

Mr. Gibson: There is one other thing we have discussed this morning. In the exceptions which were presented to us it was suggested we were not complying with the Supreme Court rule relative to the diminution of the record. Mr. Lamorelle and I have discussed this matter, and he has tentatively agreed that if Your Honor approves the bill and it has been finally decided that an appeal be taken—it has not been determined yet by the Solicitor what action will be taken in this case—that we will get together and [fol. 408] agree on a diminution of the record and present the testimony in narrative form by agreement of counsel.

The Court: If you are both satisfied, all right.

Mr. Lamorelle: If Your Honor please, in this case I called attention to the rule of the Supreme Court of the United States which provides for that.

The Court: It can be done. But the record is so voluminous I hope something will not happen as it did in one case I recall; when the record got in Court I didn't recognize the case.

Mr. Lamorelle: I understand, Your Honor, the Government hasn't determined finally whether or not they are going to taken an appeal in this case. If an appeal is taken, it is understood that the record will be diminished and put in narrative form.

The Court: All right.

Mr. Gibson: We will amend our bill and present it to Your Honor.

Mr. Lamorelle: If Your Honor please, there is one other thing I would like to appear on the record. This bill of exceptions was sent to us for our approval; we are not approving the bill.

Mr. Gibson: We are not asking it be approved now.

The Court: All right, that will be made a matter of record.

Mr. Curtin: Your Honor, in order to protect the rights of [fol. 409] the Government I want to ask Your Honor to extend the term in which to file the bill of exceptions. The March Term, as Your Honor knows, expires on the second Monday of June, which is not very far off, and if

we don't get the bill sealed and in at that time there might be some difficulty, so, I would suggest in the order that you extend the term for filing the bill of exceptions.

The Court: All right.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TERM OF COURT—Filed September 13, 1937

And Now, to wit: this thirteenth day of September, A. D. 1937, the term for filing the Bill of Exceptions and the time therein is hereby extended up to and including October 13, 1937, in the September 1937 Term of said Court.

Welsh, J.

[fol. 410] IN UNITED STATES DISTRICT COURT

OPINION—Filed March 13, 1937

Trial before the Court without a Jury

WELSH, J.

This case is before us upon petition of the Real Estate-Land Title and Trust Company to recover from the United States $153,208.31 alleged to be an overpayment of income tax for the fiscal year ending October 31, 1928. The claim is based upon the refusal of the Collector of Internal Revenue to allow a deduction for obsolescence of a title search plant alleged to have been abandoned as useless during that year.

The facts upon which the issue must be determined were submitted by stipulation of the parties and by oral testimony before the Court sitting without a jury. Counsel have specifically requested findings of the facts upon which the Court shall reach its conclusion, and for that reason we briefly summarize the evidence important to the issue.

In September of 1927 while negotiations for merger were pending between the Real Estate Title Insurance & Trust Company and the West End Trust Company, a proposal was made to include in the consolidation, the Land Title and Trust Company. As a result, an agreement was entered into on October 3, 1927 under which those three companies

merged and became the Real Estate-Land Title and Trust Company by approval of the merger and issuance of letters patent on October 31, 1927. The new company succeeded [fol. 411] to the corporate powers of the merging corporations and took over their assets under the terms of the agreement. Among them were two title search plants formerly maintained by the Real Estate Title Insurance and Trust Company and by the Land Title & Trust Company respectively, which plants contained substantially the same title information and records. The plant of the Real Estate Title was begun in 1876 and that of the Land Title in 1886, and from then on, both plants were enlarged and kept up to date at great expense by the continuous acquisition of current recordings down to the time of the merger. They were valued for merger purposes at $800,000.00 each, carried on the books of the new company at $1,600,000.00 and deductions were made for depreciation or obsolescence of the Land Title plant on Report of Shares filed with the Commonwealth of Pennsylvania at the rate of $50,000.00 per year.

Pending consummation of the merger, it was not determined what use or disposition would be made of the two plants to be acquired, but soon thereafter and prior to the granting of letters patent, certain officers of the new company made a survey of both plants and decided to try out the operation of the Real Estate Title plant alone, holding the Land Title plant in reserve. The trial was successful for the company and decided finally that it would be most advantageous to maintain the Real Estate Title plant and discard the other, inasmuch as it required only forty-three employees as against 124 for the Land Title plant, and was simpler in operation. In October and continuing through part of November, 1927, the Land Title plant was removed from the former offices and stored at 517 Chestnut Street [fol. 412] where it has remained to the present time. It was used at first in connection with title matters then pending, especially those relating to properties to be sold at the Sheriff's sale of November, 1927, and subsequently only on infrequent occasions as a reference to avoid the necessity of inspecting the public records. The plant was never continued by the addition of current recordings, which during the year would have included 227,498 entries and there is no direct evidence as to what the company ultimately intended to do with it. In 1928 unsuccessful negotiations

were had for its sale, but since then, because of the obsolete condition of the plant, the expense of bringing it down to date, the cost of operation, the decline in the volume of title business and the fact that a title insurance business may be carried on without such a complete and expensive plant, it has become, as a practical matter, actually unsaleable. For similar reasons and also because the plaintiff has a complete and less expensive plant, it has been discarded and neglected and is now considered to have only a salvage value.

Plaintiff filed its income tax for the year ending October 31, 1928, reporting net income of $2,551,776.91 on which it paid a tax of $312,592.67 and later an additional assessment of $865.06. No deduction had ever been claimed or allowed for depreciation, obsolescence or amortization of the plant in question while it was owned by the Land Title. But on December 12, 1930, the plaintiff filed a claim for refund of income tax paid for the taxable year, 1928, in the amount of $153,208.31, alleging that it was entitled to deduct for obsolescence during that year $1,250,000.00 representing the whole value of the Land Title plant alleged [fol. 413] to have been abandoned. The entire claim was disallowed by the Revenue Collector.

The questions arise as to whether the plant became useless and was actually abandoned during the year 1928, and therefore obsolete within the meaning of the law; or whether at the time it was acquired it was a valueless duplicate of a similar asset owned and used by the company, and therefore not a proper subject upon which to base a claim for obsolescence.

The Revenue Act of 1928, Section 23, allows taxpayers to deduct from their income a reasonable allowance for depreciation and obsolescence, the basis for which is the difference between the value on March 1, 1913, if acquired before that date, and the value at the time of the sale or other disposition of the property (Sec. 113). This privilege applies where the assets for which the deduction is claimed was acquired by the tax payer in connection with a reorganization or merger in which at least 80% of the interests remain in the same persons, which circumstances exist in the present case (Sec. 113-A, 7; Fairbanks Court Wholesale Grocery Co. vs. Commissioner, 84 Fed. 2d 18, 1936). If the obsolescence claimed was an actual loss during the year and

not covered by insurance, then it would seem conclusive that the deduction must be allowed.

Obsolescence, though defined in many ways, may for the present purposes be deemed to be the means or process by which property ceases to be useful or adequate for the business of the tax payer, whether as a result of prohibitory laws, changes in the art, loss of trade, inadequacy or other things, apart from physical deterioration, causing a diminution of the value and usefulness to the purpose for which it [fol. 414] was acquired (Burnett vs. Niagara Falls Brewing Co. 282 U. S. 648, 1931; United States vs. Wagner Electric Mfg. Co. 61 Fed. 2d, 204, 1932; United States Cartridge Co. vs. United States, 284 U. S. 511; Stroh Brewery Co. vs. Commissioner, 16 B. T. A. 1192). There is no doubt that the Land Title plant had value and was useful at the time acquired, or that because of the non-user, the failure to maintain it, and the decline in title business subsequent thereto, it was stored, discarded and became practically useless and valueless in the business. In addition the officers of the company have declared, without contradiction, that the plant has been actually abandoned, is not intended to be used again, and that a sale although considered has not been found possible. Although property merely placed in storage and not sold or actually abandoned is not a proper subject for a claim of obsolescence (Marigold Garden Co. vs. Commissioner, 6 B. T. A. 368), the facts in the present case would seem to meet the standard of abandonment required as a basis of a deduction under the act, in that it indicates the intention of the owners to discard the property coupled with such physical abandonment as to confirm that intention. (Foxrun Paper Co. vs. Commissioner, 28 B. T. A. 1184, 1933; Reuben H. Donnally Corp. 26 B. T. A. 107; I. G. Zumwalt, 25 B. T. A. 566).

On the other hand we are asked by defendant to infer from the facts and circumstances presented, that because the plaintiff knew the plant in question was a duplicate at the time of acquisition, it was never intended to be used and [fol. 415] therefore never constituted a useful asset or the subject of a proper claim for obsolescence. If such were the fact, we would find no difficulty in deciding the issue according to the principle of Article 172, Regulation 74, and the cases holding that assets acquired with the expectation of voluntarily abandoning them (Liberty Baking Co. vs. Heirer, 34 Fed. 2nd, 513) or merely to dispense with competition

(Newspaper Printing Co. vs. Commissioner, 56 Fed. 2d, 125) do not constitute deductible losses; although even that rule has been modified and a loss allowed where assets were acquired and scrapped with the view to limiting competition (Sanitary Mfg. Co. vs. Commissioner, 34 Fed. 2d, 439, 1929). But here we fail to find anything which clearly establishes an intention to abandon the plant prior to its acquisition. J. Willison Smith, President successively of the West End Trust Company and of the plaintiff herein, states that he assumed the Land Title plant would be used as the basis of the new business or combined with the other plant, the survey of the two plants to determine their usefulness was not made until after the new company was bound by the agreement to acquire both plants, and the Land Title plant was actually used to a limited extent after the merger. These circumstances do not indicate any definite previous intention to abandon as worthless the plant in question, nor are we precluded from considering the possible intention of the company to merge the better elements of both plants to form a new one, or even to sell one or the other for the purposes of the business. We decline to presume the existence of an intention to completely discard the plant [fol. 416] prior to its acquisition, and on the contrary affirm that there is no proof of any intention that would bar the present claim of abandonment and obsolescence. It has already been decided that a useless and discarded title or abstract plant is a proper subject of a claim for obsolescence (Crooks vs. Kansas City Title Co. 46 Fed. 2nd, 928, 1931) and that the deduction can be taken in the year in which the loss was sustained (Reg. 74, Art. 173), and we are convinced that the facts here present just such a case.

As to the amount of the deduction to be allowed, we note that two well qualified experts have given values of $1,000,000.00 and $1,250,000.00 respectively of the Land Title plant as of March 1, 1913 and $125,000.00 and $100,000.00 respectively as of October 31, 1928, the date of the claim for obsolescence. No contrary testimony has been submitted, but the suggestion is made that the plant should be considered as of greater value because of the good will attaching thereto and because of the advantage to the new company from reduced competition. However, it does not appear that there is any good will attached to the plant which is separate and distinct from the good will of the whole business of the former owner acquired by the plain-

tiff in the merger; nor has it been shown that the acquisition of that plant has enhanced the business and is valuable in itself. On the contrary, the title business of the new company was substantially less than the aggregate title business done by the two separate companies during the previous year. The burden of establishing values is on the plaintiff and the values given by the experts have not been denied as to amount. These appraisals being at best only the opinions of experts, we believe the circumstances [fol. 417] warrant the fixing of the more conservative values, and we find that the value on March 1, 1913 was $1,000,000.00 and that the salvage value as of October 31, 1928 was $125,000.00 making an actual loss from obsolescence for the taxable year 1928 of $875,000.00. The tax payer was entitled to deduct that amount for the taxable year, and since the tax has already been paid, it is now entitled to recover the difference between the tax paid and the amount which would have been payable had the deduction been taken and allowed at that time.

We believe that this conclusion is in line with the principle that tax laws are to be liberally construed in favor of the tax payer (Farmers' Loan vs. Minnesota, 280 U. S. 204—212; Bowers vs. New York and Albany Co., 273, U. S. 346—350) and that the plaintiff in this case has sustained the burden of showing an actual deductible loss as required by law (Reinecke vs. Spalding, 280 U. S. 227).

Counsel are directed to submit a calculation showing the computation for income tax for the taxable year ending October 31, 1928, including the allowance for obsolescence of the title plant in question in the amount of $875,000.00, and judgment may thereafter be entered for the plaintiff in the amount shown to have been paid by the tax payer in excess of the actual tax found to be due in accordance herewith.

[fol. 418] In United States District Court

Findings of Fact and Conclusions of Law—Filed March 13, 1937

The plaintiff-petitioner has filed requests for findings of fact and conclusions of law which, with my rulings thereon, are as follows:

Findings of Fact

1. The Real Estate-Land Title and Trust Company, plaintiff-petitioner in the above-entitled proceeding, is a corpora-

tion organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at the southwest corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania. (Stipulation Par. 1).

I so find.

2. Pursuant to the Act of Congress known as the Revenue Act of 1928 (45 Stat. 795), plaintiff-petitioner herein, on January 15, 1929, filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, on the form prescribed therefor, its return of income for the fiscal year ending October 31, 1928, in which the amount of net income reported by the plaintiff-petitioner was $2,551,776.91, upon which amount of net income there was shown due on the said return for the said fiscal year Federal income tax in the amount of $312,592.67. (Stipulation Pars. 2 and 3).

I so find.

[fol. 419] 3. The said amount of Federal income tax, namely $312,592.67, shown due as aforesaid for the fiscal year ending October 31, 1928, was assessed against the said The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, and was paid by the said The Real Estate-Land Title and Trust Company to Joseph S. McLaughlin, then Collector of Internal Revenue at Philadelphia, Pennsylvania, in the following instalments on the following dates:

January 15, 1929	$78,148.17
April 15, 1929	78,148.17
July 14, 1929	78,148.17
December 15, 1929	78,148.16
	$312,592.67

(Stipulation Par. 4).

I so find.

4. An additional income tax in the amount of $865.06 was assessed against plaintiff-petitioner by the Commissioner of Internal Revenue based upon a taxable net income determined by said Commissioner to be $2,558,838.64 for the plaintiff-petitioner's fiscal year ending October 31, 1928, which said additional tax of $865.06, with interest thereon amounting to $83.31, was paid by plaintiff-petitioner to Joseph S. McLaughlin, then Collector of Internal Reve-

nue at Philadelphia, Pennsylvania, on September 3, 1930 (Stipulation Pars. 5 and 6).

I so find.

5. The Real Estate-Land Title and Trust Company, plaintiff-petitioner herein, was formed by the consolidation and merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West [fol. 420] End Trust Company in accordance with the terms of an agreement entered into by said three companies and a majority of the Directors of each of them under date of October 3, 1927 (Stipulation Pars. 7 and 8).

I so find.

6. The agreement of consolidation and merger was ratified by the stockholders of the three corporations, parties thereto, and a charter issued to the plaintiff-petitioner by the Governor of Pennsylvania on October 31, 1927. The Directors of the plaintiff-petitioner held their organization meeting at 3:15 P. M. on October 31, 1927 and the plaintiff-petitioner opened for business on November 1, 1927 (Stipulation Pars. 9 and 10).

I so find.

7. All of the capital stock of the said The Real Estate-Land Title and Trust Company was issued to the former stockholders of the three merging corporations in consideration for the assets of said corporations acquired by the said The Real Estate-Land Title and Trust Company, including the title plant of the Land Title and Trust Company, so that the entire interest and control in such property remained in the same persons (Stipulation Par. 11).

I so find.

8. The Real Estate-Land Title and Trust Company, plaintiff-petitioner, engages, inter alia, in the title insurance business, including searches and insurance of titles of real estate.

I so find.

9. The said title plant formerly owned by the Land Title [fol. 421] and Trust Company was acquired by it during the years 1886 and 1887 at a cost of $251,509.84. Additions to said plant were made in the years 1888, 1889 and 1890 at a cost of $24,541.78. From 1890 to February 28, 1913 at

least $317,645.36 was expended in maintaining the said title plant and keeping it up to date, which materially increased the value of the said title plant (Stipulation Par. 13).

I so find.

10. Each of the title plants formerly owned by the said Land Title and Trust Company and the said Real Estate Title Insurance Trust Company was taken into the merger at a valuation of $800,000 (Stipulation Par. 11).

I so find.

11. No deduction was ever claimed by or allowed to the said Land Title and Trust Company for income tax purpose for depreciation, wear and tear, obsolescence, amortization or depletion on the said title plant formerly owned by the said Land Title and Trust Company up to and including October 31, 1927, the date of the merger (Stipulation Par. 18).

I so find.

12. No deduction has ever been allowed to the plaintiff-petitioner for income tax purposes on account of depreciation, wear and tear, obsolescence, amortization, depletion or abandonment of the said title plant formerly owned by the said Land Title and Trust Company (Stipulation Par. 19).

I so find.

13. The negotiations for the merger were first taken up by the West End Trust Company and the Real Estate Title [fol. 422] Insurance and Trust Company and they had agreed on a two-company merger before the Land Title and Trust Company was considered as a party to the merger, which was not until the latter part of September 1927, about two weeks before the merger agreement was signed (Testimony page 19).

I so find.

14. When the merger agreement was signed, there was no definite plan about the disposition of the title plants then owned by the Land Title and Trust Company and the Real Estate Title Insurance and Trust Company (Testimony page 21).

I so find.

15. The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927 (Testimony pages 23-24).

I so find.

16. No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October 1927. To keep the plant up to date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927 and ending October 31, 1928. (Testimony page 152).

I so find.

17. After the merger agreement was executed, an examination of the title plants of the Land Title and Trust Company and the Real Estate Title Insurance and Trust Company was made to determine the best use to make of the plants and to see whether they might be used together [fol. 423] (Testimony page 21).

I so find.

18. Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Testimony pages 58 and 142).

I so find.

19. After said investigation, it was determined that the plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Testimony pages 5, 6 and 8).

I so find.

20. The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa. and stored there during the latter part of October and early part of November 1927 (Testimony page 66).

I so find.

21. About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the

purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, [fol. 424] which had been put in storage, would not be needed (Testimony page —).

I so find.

22. Negotiations were carried on for the sale of the title plant formerly owned by the Land Title and Trust Company with the Bankers Trust Company of Philadelphia as a prospective purchaser in the early part of 1928 and a price of $1,000,000 was put on the plant by Mr. J. Willison Smith, President of the plaintiff-petitioner, but the negotiations fell through and no offer for the said title plant was ever received by the plaintiff-petitioner in any amount (Testimony pages 25-6).

I so find.

23. The said title plant formerly owned by the Land Title and Trust Company was abandoned by the plaintiff-petitioner during its fiscal year commencing November 1, 1927 and ending October 31, 1928.

I so find.

24. The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927 and ending October 31, 1928 and became obsolete on or before October 31, 1928.

I so find.

25. The fair market value on March 1, 1913 of the said title plant formerly owned by the Land Title and Trust Company was not less than $1,000,000 (Testimony page 148—Mecutchen). The fair market value on March 1, 1913 of the said title plant formerly owned by the Land Title [fol. 425] and Trust Company was $1,250,000 (testimony page 101—Robbins).

I find that on March 1, 1913 the fair market value of the said title plant was $1,000,000. I refuse to find that its fair market value at said time was $1,250,000.

26. The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land Title and Trust Company was not more than $125,000 (testimony page 148 —Mecutchen). The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land

Title and Trust Company was $100,000 (testimony page 103—Robbins).

I find that on October 31, 1928 the fair market value of the said title plant was $125,000. I refuse to find that its fair market value at said time was $100,000.

27. The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927 and ending October 31, 1928 in an amount equal to the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and the fair market value of said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount not less than $875,000 (testimony of Mecutchen supra). The plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000 (testimony of Robbins supra).

I find the facts to be in accordance with the first two sentences of said request, but I refuse to find, as requested [fol. 426] in the last sentence, that the plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000.

28. On or about December 12, 1930, plaintiff-petitioner herein filed with the then Collector of Internal Revenue at Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claim for refund of Federal income tax for the fiscal year ending October 31, 1928 in the amount of $153,125.00 on Form 843, alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the said title insurance plant (formerly owned by the Land Title and Trust Company) during the said fiscal year (Stipulation Par. 20).

I so find.

29. The then Commissioner of Internal Revenue refused to refund to plaintiff-petitioner herein the said amount of $153,125.00, or any other amount for the fiscal year ending October 31, 1928, and on the 20th day of February 1931 the then Commissioner of Internal Revenue disallowed the said claim for refund filed by plaintiff-petitioner herein for the fiscal year ending October 31, 1928. (Stipulation Par. 21).

I so find.

30. This action was brought for the recovery of Federal income tax, which income tax is an internal revenue tax

and was collected by Joseph S. McLaughlin as Collector of Internal Revenue for the First District of Pennsylvania, the said Joseph S. McLaughlin having been Collector of Internal Revenue for the First District of Pennsylvania at the times of the payment of the income tax and interest, [fol. 427] for the recovery of which this proceeding was instituted. The said Joseph S. McLaughlin was dead at the time this proceeding was commenced and therefore not in office as Collector of Internal Revenue at such time, and no part of the said income tax or interest, for the recovery of which this proceeding was instituted, was paid to the Collector of Internal Revenue for the First District of Pennsylvania who was in office at the time this proceeding was commenced. (Stipulation Par. 22).

I so find.

31. This proceeding was commenced after the passage of the Revenue Act of 1921, for the recovery of an internal revenue tax alleged by plaintiff-petitioner to have been erroneously and illegally assessed and collected. This suit was brought within six years after the right accrued for which claim is made in this proceeding. (Stipulation Par. 23).

I so find.

Conclusions of Law

1. The merger and consolidation of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company was effected under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the 3rd day of May A. D. 1909, P. L. 408, and supplements thereto.

I make this conclusion.

2. The merger of the Land Title and Trust Company, the Real Estate Title Insurance and Trust Company and the West End Trust Company on October 31, 1927 was a trans- [fol. 428] action in which no gain or loss to any of the said Companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act of Congress properly applicable thereto. (Stipulation Par. 17).

I make this conclusion.

3. No deduction was properly allowable to the Land Title and Trust Company for income tax purposes at any time prior to the merger of October 31, 1927 on account of de-

preciation, wear and tear, obsolescence, amortization or depletion on the title plant formerly owned by the said Land Title and Trust Company and acquired by the plaintiff-petitioner upon the merger.

I make this conclusion.

4. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 all losses sustained by it during said year not compensated for by insurance or otherwise.

I refuse to make this conclusion.

5. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for the obsolescence of any of its assets used in its business.

I make this conclusion.

6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of [fol. 429] Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company.

I make this conclusion.

7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company.

I make this conclusion.

8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928.

I make this conclusion.

9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000.

I make this conclusion.

10. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of [fol. 430] Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the amount of $1,150,000.

I refuse to make this conclusion.

11. Counsel for plaintiff-petitioner shall calculate and submit to the Trial Judge the amount of refund of income tax to which the plaintiff-petitioner is entitled under the above findings, and thereafter a judgment or decree shall be entered in favor of the plaintiff-petitioner and against the defendant for the amount of income tax properly refundable to the plaintiff-petitioner for its fiscal year ending October 31, 1928, with interest thereon as allowed by law.

I so rule.

The defendant's requests for findings of fact and conclusions of law, with my rulings thereon, are as follows:

Findings of Fact

I. That the two title insurance plants acquired by the Real Estate-Land Title and Trust Company, plaintiff-petitioner, upon the merger, in addition to being designed and used by the respective former owners for the same general purpose, were duplicates, and the title search plants of each included the same information and they were two of the three most complete and extensive title insurance plants existing in the City of Philadelphia at the date of the merger on October 31, 1927.

I refuse so to find.

II. That the two title insurance plants acquired by The Real-Estate Land Title and Trust Company, plaintiff-petitioner, as a result of the said merger and/or consolidation, [fol. 431] consisted of two parts, namely (1) abstracts of title of the public records of Philadelphia County, including deeds, mortgages, sheriffs' deeds, assignments, releases,

etc., all indexed, plotted and located on plans of the City as subdivided into sections and blocks, and (2) separate abstracts of title, searches and opinions in each matter for which the company issued its title insurance policy, or obligations of such nature.

I refuse so to find.

III. That for the purposes of the merger and/or consolidation the value placed thereon at $800,000.00 each included both the complete plants, as defined in the foregoing paragraph, and it is not contended by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, nor does the evidence indicate that the second part, namely, separate abstracts of title, searches and opinions in each matter for which the former company issued its title insurance policy, or obligation of such nature, was abandoned or otherwise, but the testimony shows that this part of both title insurance plants was used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, during the fiscal period beginning November 1, 1927 and ending October 31, 1928; and it is that part of the title insurance plant commonly called "title search plant" and formerly owned by The Land Title and Trust Company which The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contends was abandoned and became obsolescent during the fiscal period beginning November 1, 1927, and ending on October 31, 1928.

I refuse so to find.

[fol. 432] IV. That prior to the merger and/or consolidation and the organization on the 31st day of October, 1927, and the opening for business on November 1, 1927, of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, all of the parties thereto knew that only the Real Estate Title Insurance and Trust Company's search plant would be used in its business, and the determination to store the title search plant of The Land Title and Trust Company was arrived at during the month of October, 1927, and immediately thereafter and during said month posting of the records of the said plant was discontinued, and the officers and directors of The Land Title and Trust Company immediately proceeded to store these records, the greater part of which was done during the month of October, 1927, and completed immediately thereafter.

I refuse so to find.

V. That after the merger and/or consolidation and the issuance of letters patent to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, on October 31, 1927, the title search plant of The Land Title and Trust Company was no longer used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, in any manner relative to the search of the public records or the abstracting of titles, and no further posting of the books of The Land Title and Trust Company's search plant was done or in any manner kept up-to-date by The Real Estate-Land Title and Trust Company, plaintiff-petitioner from the date of the commencement of business on November 1, 1927, or otherwise used in the business of The Real Estate-Land [fol. 433] Title and Trust Company, plaintiff-petitioner.

I refuse so to find.

VI. That although the title search plant of The Land Title and Trust Company was never advertised for sale and no honest effort was made to dispose of it by sale, upon inquiry by interested parties, the president of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, sometime during the early part of 1928, placed a tentative price thereon of $1,000,000.00, which was in excess of the value placed upon the complete title insurance plant for the purposes of the merger; and, although the testimony of The Real Estate-Land Title and Trust Company's witnesses was that there was a great amount of goodwill in the title insurance business attributable to applications, separate abstracts of title, searches and opinions, briefs of title and the possession of a complete title search plant in connection with the title insurance business, it did not segregate or show the amount of this goodwill and prestige value.

I refuse so to find.

VII. That the information and other data contained in the title search plant of The Land and Trust Company, stored by The Real Estate-Land Title and Trust Company's predecessor in October, 1927, was as valuable and essentially the same at the end of the fiscal period ended October 31, 1928, as it was on October 31, 1927, the date of the organization of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, and prior to the opening for business on November 1, 1927, and if brought down to date [fol. 434] at the end of the fiscal year of plaintiff-petitioner

on October 31, 1928, it would be essentially the same complete title plant as it was prior to the date upon which The Land Title and Trust Company ceased to post the books; that the expense of bringing a complete title search plant, such as that formerly possessed by The Land Title and Trust Company, down to date for the twelve-month period in the City of Philadelphia, ended October 31, 1928, would not exceed $75,000.00.

I refuse so to find.

VIII. That the officers and directors of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, were former directors and officers of the three merging companies and as such had wide experience in the title insurance business and the conduct of title search plants in the City of Philadelphia; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, knew—and the facts clearly show—that prior to its organization one of the title search plants acquired by it as a result of the merger would not be used in its business, and although The Real Estate-Land Title and Trust Company, plaintiff-petitioner, has not indicated for what purpose the duplicate plants were acquired, the facts and circumstances clearly indicate that the acquisition of the two plants would give to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, a greater amount of business in the City of Philadelphia than it otherwise would have, since it is admitted that upon the consolidation and merger there remained only one other complete title search plant in the City of Philadelphia, and [fol. 435] would result in the retaining of the same amount of business as was theretofore done by two separate plants, with the advantage of the reduction in cost of operation of only one title search plant, which clearly shows that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was compensated by increased business and lessened cost on account of the non-user of the title search plant of the former The Land Title and Trust Company.

I refuse so to find.

IX. The title search plant of the former The Land Title and Trust Company, which was never used by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, contained the same information that was contained in any complete title search plant in the City of Philadelphia, and upon the date of the merger and/or consolidation of The

Real Estate-Land Title and Trust Company, plaintiff-petitioner, it was essentially as valuable as that of the other title search plant taken into the merger, as is evidenced by the value placed thereon, and on October 31, 1928, there was no diminution in the information contained therein though not in use for a period of twelve months, and was essentially as valuable for the purpose for which it was constructed, in regard to title insurance, up to and including the date on which its books ceased to be posted. From all of which it may be reasonably concluded that the acquisition of the title search plant by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was not for the purpose of use in the business. I refuse so to find.

[fol. 436] X. The complete title insurance plant of The Land Title and Trust Company was carried on the books of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as an asset account without diminution in value other than the sum of $50,000.00 sought to be taken as a deduction in its return of income for the period ended October 31, 1928.

I refuse so to find.

XI. That any loss attributable to a particular year for obsolescence or otherwise is a loss occurring by reason of something happening in that year; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, did not use the title search plant of the former The Land Title and Trust Company during the year under review.

I refuse so to find.

Conclusions of Law

I. That there is no authority in any statute permitting deductions for obsolescense of property which was not used in the trade or business during the taxable year.

I make this conclusion.

II. That the statute contemplates a reasonable allowance for obsolescence of tangible property used in the trade or business where the property is a wasting asset, but the information contained in a title search plant that it is not of such character as contemplated by the applicable statutes on obsolescence.

I refuse to make this conclusion.

III. That the acquisition of the title search plant of The Land Title and Trust Company by The Real Estate-Land [fol. 437] Title and Trust Company, plaintiff-petitioner, was a capital transaction resulting in a permanent benefit to plaintiff-petitioner, through the elimination of competition, an added goodwill and the handling of the combined business at a reduction of operating cost.

I refuse to make this conclusion.

IV. That the intangible goodwill value to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, on account of the possession of the title search plant of The Land Title and Trust Company is not subject to obsolescence.

I make this conclusion.

V. That The Real Estate-Land Title and Trust Company, plaintiff-petitioner, is not entitled to recover.

I refuse to make this conclusion.

VI. That judgment should be for the defendant.

I refuse to make this conclusion.

By the Court, Welsh, J.

[fol. 438] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT—Filed September 28, 1937

Comes now the defendant, the United States of America, by its attorneys, Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, and Lester L. Gibson Special Assistant to the Attorney General and moves the Court for judgment in its favor and for its costs, on the ground that the pleadings and the evidence are insufficient to support a judgment in favor of the plaintiff.

Charles D. McAvoy, United States Attorney. By Thomas J. Curtin, Lester L. Gibson, Spec. Asst. to Atty. General.

[fol. 439] IN UNITED STATES DISTRICT COURT

JUDGMENT FOR PLAINTIFF—Filed March 31, 1937

And now, to wit, this 25th day of March A. D. 1937 a calculation showing the computation for plaintiff's income tax

for the taxable year ending October 31, 1928 having been submitted by counsel, which calculation is hereto attached, judgment is entered in favor of the plaintiff, The Real Estate-Land Title and Trust Company, and against the defendant, the United States of America, in the amount of $107,270.81 with interest at 6% per annum on $948.37 thereof from September 3, 1930, on $78,148.16 thereof from December 15, 1929 and on $28,174.28 thereof from July 14, 1929.

By the Court, Welsh, J.

CALCULATION OF PLAINTIFF'S INCOME TAX FOR 1928

(Filed March 31, 1937)

Adjusted net income as set forth in letter from Commissioner of Internal Revenue dated June 6, 1930	$2,558,838.64
From which deduct allowance for obsolescence of title plant allowed by opinion of Welsh, J.	875,000.00
[fol. 440] Corrected net income	1,683,838.64
Total income tax payable on corrected net income	206,270.23
Income tax previously assessed and paid	313,457.73
Overpayment of income tax	107,187.50
Interest paid September 3, 1930 on additional assessment of tax	83.31
Total overpayment of income tax and interest actually paid	$107,270.81

Judgment should be entered in the above amount of $107,270.81 with interest as follows:

On $948.37 thereof from September 3, 1930.
On $78,148.16 thereof from December 15, 1929.
On $28,174.28 thereof from July 14, 1929.

[fol. 441] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 18, 1937

And now, to wit: this 18th day of June, A. D., 1937, comes the United States of America by its attorneys, J.

Cullen Ganey, Acting United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, feeling aggrieved by the judgment entered herein on March 31, 1937 in favor of the plaintiff and against the defendant, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, and prays that said appeal may be allowed, and does hereby present its assignments of error, and prays that said case may be certified to the said Circuit Court of Appeals for the Third Circuit.

J. Cullen Ganey, Acting United States Atty., Thomas J. Curtin, Assistant United States Atty.

ORDER ALLOWING APPEAL

And now, to wit: this 18th day of June, A. D., 1937, it is Ordered that the appeal be allowed as prayed for.

Welsh, J.

[fol. 442] IN UNITED STATES DISTRICT COURT

EXCEPTION—Filed June 18, 1937

And now, to wit: this 18th day of June, A. D., 1937, the defendant, the United States of America by its attorneys, J. Cullen Ganey, Acting United States Attorney in and for the Eastern District of Pensylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, excepts to the action of the Court in entering judgment for the plaintiff and against the defendant.

J. Cullen Ganey, Acting United States Atty., Thomas J. Curtin, Assistant United States Atty.

ORDER ALLOWING EXCEPTION

And now, to wit: this 18th day of June, A. D. 1937, the above exception is allowed.

Welsh, J.

[fol. 443] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 18, 1937

Now Comes the United States of America, by J. Cullen Ganey, Jr., United States Attorney, and Thomas J. Curtin, Assistant United States Attorney, and in connection with its appeal, files the following assignments of errors:

1. The Court erred in rendering judgment in favor of the plaintiff.

2. The Court erred in failing to grant defendant's motion for judgment.

3. The Court erred in failing to render judgment in favor of the defendant.

4. The facts will not support a judgment in favor of the plaintiff.

5. The Court erred in failing to find the following facts as requested by the defendant in its request numbered I:

That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, upon the merger, in addition to being designed and used by the respective former owners for the same general purpose, were duplicates, and the title search plants of each included the same information; and they were two of the three most complete and extensive title insurance plants existing in the city of Philadelphia at the date of the merger on October 31, 1927.

[fol. 444] 6. The Court erred in failing to find the following facts as requested by the defendant in its request numbered II:

That the two title insurance plants acquired by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as a result of the said merger and/or consolidation, consisted of two parts, namely (1) abstracts of title of the public records of Philadelphia County, including deeds, mortgages, sheriff's deeds, assignments, releases, etc., all indexed, plotted and located on plans of the City as subdivided into sections and blocks, and (2) separate abstracts of title, searches and opinions in each matter for which the company issued its title insurance policy, or obligations of such nature.

7. The Court erred in failing to find the following facts as requested by the defendant in its request numbered III:

That for the purposes of the merger and/or consolidation the value placed thereon at $800,000.00 each included both the complete plants, as defined in the foregoing paragraph, and it is not contended by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, nor does the evidence indicate that the second part, namely, separate abstracts of title, searches and opinions in each matter for which the former company issued its title insurance policy, or obligation of such nature, was abandoned or otherwise, but the testimony shows that this part of both title insurance plants was used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, during the fiscal period beginning November 1, 1927 and ending October 31, 1928; and it is that part of the title insurance plant commonly [fol. 445] called "title search plant" and formerly owned by The Land Title and Trust Company which the Real Estate-Land Title and Trust Company, plaintiff-petitioner, contends was abandoned and became obsolescent during the fiscal period beginning November 1, 1927, and ending on October 31, 1928.

8. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered IV:

That prior to the merger and/or consolidation and the organization on the 31st day of October, 1927, and the opening for business on November 1, 1927, of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, all of the parties thereto knew that only the Real Estate Title insurance and Trust Company's search plant would be used in its business, and the determination to store the title search plant of the Land Title and Trust Company was arrived at during the month of October, 1927, and immediately thereafter and during said month posting of the records of the said plant was discontinued, and the officers and directors of The Land Title and Trust Company immediately proceeded to store these records, the greater part of which was done during the month of October, 1927, and completed immediately thereafter.

9. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered V:

That after the merger and/or consolidation and the issuance of letters patent to The Real Estate-Land Title and

Trust Company, plaintiff-petitioner, on October 31, 1927, [fol. 446] the title search plant of The Land Title and Trust Company was no longer used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, in any manner relative to the search of the public records or the abstracting of titles, and no further posting of the books of The Land Title and Trust Company's search plant was done or in any manner kept up-to-date by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, from the date of the commencement of business on November 1, 1927, or otherwise used in the business of The Real Estate-Land Title and Trust Company, plaintiff-petitioner.

10. The Court erred in failing to find the following facts as requested by the defendant in its request numbered VI:

That although the title search plant of The Land Title and Trust Company was never advertised for sale and no honest effort was made to dispose of it by sale, upon inquiry by interested parties, the president of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, sometime during the early part of 1928, placed a tentative price thereon of $1,000,000.00, which was in excess of the value placed upon the complete title insurance plant for the purposes of the merger; and, although the testimony of The Real Estate-Land Title and Trust Company's witnesses was that there was [illegible] amount of goodwill in the title insurance business attributable to applications, separate abstracts of title, searches and opinions, briefs of title, and the possession of a complete title search plant in connection with the title insurance business, it did not segregate or show the amount of this goodwill and prestige value.

[fol. 447] 11. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered VII:

That the information and other data contained in the title search plant of The Land Title and Trust Company, stored by The Real Estate-Land Title and Trust Company's predecessor in October, 1927, was as valuable and essentially the same at the end of the fiscal period ended October 31, 1928, as it was on October 31, 1927, the date of the organization of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, and prior to the opening for business on November 1, 1927, and if brought down to date

at the end of the fiscal year of plaintiff-petitioner on October 31, 1928, it would be essentially the same complete title plant as it was prior to the date upon which The Land Title and Trust Company ceased to post the books; that the expense of bringing a complete title search plant, such as that formerly possessed by The Land Title and Trust Company, down to date for the twelve-month period in the City of Philadelphia, ended October 31, 1928, would not exceed $75,000.00.

12. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered VIII:

That the officers and directors of The Real Estate-Land Title and Trust Company, plaintiff-petitioner were former directors and officers of the three merging companies and as such had wide experience in the title insurance business and the conduct of title search plants in the City of Philadelphia; that the Real Estate-Land Title and Trust Com- [fol. 448] pany, plaintiff-petitioner, knew—and the facts clearly show—that prior to its organization one of the title search plants acquired by it as a result of the merger would not be used in its business, and although The Real Estate-Land Title and Trust Company, plaintiff-petitioner, has not indicated for what purpose the duplicate plants were acquired, the facts and circumstances clearly indicate that the acquisition of the two plants would give to The Real Estate-Land Title and Trust Company, plaintiff-petitioner, a greater amount of business in the City of Philadelphia than it otherwise would have, since it is admitted that upon the consolidation and merger there remained only one other complete title search plant in the City of Philadelphia, and would result in the retaining of the same amount of business as was theretofore done by two separate plants, with the advantage of the reduction in cost of operation of only one title search plant, which clearly shows that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was compensated by increased business and lessened cost on account of the non-user of the title search plant of the former The Land Title and Trust Company.

13. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered IX:

The title search plant of the former The Land Title and Trust Company, which was never used by The Real Estate-

Land Title and Trust Company, plaintiff-petitioner, contained the same information that was contained in any complete title search plant in the City of Philadelphia, and upon the date of the merger and/or consolidation of The [fol. 449] Real Estate-Land Title and Trust Company, plaintiff-petitioner, it was essentially as valuable as that of the other title search plant taken into the merger, as is evidenced by the value placed thereon, and on October 31, 1928, there was no diminution in the information contained therein though not in use for a period of twelve months, and was essentially as valuable for the purpose for which it was constructed, in regard to title insurance, up to and including the date on which its books ceased to be posted. From all of which it may be reasonably concluded that the acquisition of the title search plant by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was not for the purpose of use in the business.

14. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered X:

The complete title insurance plant of The Land Title and Trust Company was carried on the books of The Real Estate-Land Title and Trust Company, plaintiff-petitioner, as an asset account without diminution in value other than the sum of $50,000.00 sought to be taken as a deduction in its return of income for the period ended October 31, 1928.

15. The Court erred in refusing to find the following facts as requested by the defendant in its request numbered XI:

That any loss attributable to a particular year for obsolescence or otherwise is a loss occurring by reason of something happening in that year; that The Real Estate-Land Title and Trust Company, plaintiff-petitioner, did not use the title search plant of the former The Land Title and [fol. 450] Trust Company during the year under review.

16. The Court erred in failing to make the following conclusion of law as requested by the defendant in its conclusion numbered II:

That the statute contemplates a reasonable allowance for obsolescence of tangible property used in the trade or business where the property is a wasting asset, but the information contained in a title search plant that it is not of such character as contemplated by the applicable statutes on obsolescence.

17. The Court erred in failing to make the following conclusion of law as requested by the defendant in its conclusion numbered III:

That the acquisition of the title search plant of The Land Title and Trust Company by The Real Estate-Land Title and Trust Company, plaintiff-petitioner, was a capital transaction resulting in a permanent benefit to plaintiff-petitioner, through the elimination of competition, and added goodwill and the handling of the combined business at a reduction of operating cost.

18. The Court erred in failing to make the following conclusion of law as requested by the defendant in its conclusion numbered V:

That The Real Estate-Land Title and Trust Company, plaintiff-petitioner, is not entitled to recover.

19. The Court erred in finding the following facts in its finding numbered XV:

The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-[fol. 451] petitioner after the merger in November 1927, (Testimony pages 23-4).

20. The Court erred in finding the following facts in its finding numbered XIX:

After said investigation, it was determined that the plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Testimony pages 5, 6 and 8).

21. The Court erred in finding the following facts in its finding number XXI:

About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed.

22. The Court erred in finding the following facts in its finding numbered XXIII:

The said title plant formerly owned by the Land Title and Trust Company was abandoned by the plaintiff-peti-

tioner during its fiscal year commencing November 1, 1927, and ending October 31, 1928.

23. The Court erred in finding the following facts in its finding numbered XXIV:

The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927 and ending October 31, 1928 and became obsolete on or before October 31, 1928.

[fol. 452] 24. The Court erred in finding the following facts in its finding numbered XXVI:

The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land Title and Trust Company was not more than $125,000 (testimony page 148—Mecutchen). The fair market value on October 31, 1928 of the said title plant formerly owned by the said Land Title and Trust Company was $1,000 (testimony page 103—Robbins).

25. The Court erred in finding the following facts in its finding numbered XXVII:

The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927 and ending October 31, 1928 in an amount equal to the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and the fair market value of said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount not less than $875,000 (testimony of Mecutchen supra). The plaintiff-petitioner sustained a loss in said taxable year in the amount of $1,150,000 (testimony of Robbins supra).

26. The Court erred in concluding, as a matter of law, that the plaintiff-petitioner was entitled to deduct from its net taxable income as determined by the Commissioner of Internal Revenue for its fiscal year commencing November 1, 1927, and ending October 31, 1928, the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company.

[fol. 453] 27. The Court erred in concluding, as a matter of law, that plaintiff-petitioner was entitled to deduct a rea-

sonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company; and also, that it was entitled to deduct for its fiscal year commencing November 1, 1927, and ending October 31, 1928, the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928.

28. The Court erred in concluding, as a matter of law, that plaintiff-petitioner was entitled to deduct from its net taxable income as determined by the Commissioner of Internal Revenue for its fiscal year commencing November 1, 1927, and ending October 31, 1928, an amount not less than $875,000.

29. The Court erred in failing to conclude, as a matter of law, that plaintiff-petitioner was not entitled to any deduction on account of obsolescence of its title plant.

Wherefore, the defendant prays that the judgment rendered herein be reversed with directions to the District Court of the United States for the Eastern District of Pennsylvania to enter judgment in favor of the defendant below.

J. Cullen Ganey, United State Attorney. Thomas J. Curtin, Assistant United States Attorney.

June 18, 1937.

[fol. 454] IN UNITED STATES DISTRICT COURT

AMENDED PRAECIPE FOR RECORD—Filed October 18, 1937

The Clerk, U. S. D. C., E. D. of Pa.

SIR:

Prepare transcript of record in the above entitled case for filing in appeal to the Circuit Court of Appeals and include the following:

Docket Entries
Petition for Judgment
Notice of filing Petition for Judgment
Affidavit of Service
Answer to petition.

Opinion of Judge Welsh granting judgment for plaintiff
Findings of Fact and Conclusions of Law
Judgment in favor of plaintiff
Defendant's requests for findings of fact and conclusions of law.
Petition by defendant for leave to withdraw Bill of Exceptions, etc.
Order of Court granting prayer of petitioner.
Stenographic notes taken in Court May 14, 1937.
Petition for Appeal, and Order of Court allowing the same.
Exception and Order of Court allowing exception.
Assignment of Errors.
Citation.
[fol. 455] Motion for extension of time for filing of Bill of Exceptions and Order of Court extending time for fifty days from July 24, 1937.
Order of Court extending term of Court for purpose of filing of Bill of Exceptions to October 13, 1937.
Plaintiff's Requests for Findings of Fact and Conclusions of Law.
Defendant's motion for judgment.
Bill of Exceptions.
Clerk's Certificate.

and no others.

J. Cullen Ganey, United States Attorney, Thomas J. Curtin, Assistant United States Attorney.

[fol. 456] Citation in usual form showing service on Saul, Ewing, Remick & Saul omitted in printing.

[fol. 457] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 458] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 6493. October Term, 1937

UNITED STATES OF AMERICA, Defendant-Appellant,

vs.

REAL ESTATE LAND-TITLE & TRUST COMPANY, Plaintiff-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 11th day of January A. D. 1938, it is ordered that Hon. Albert L. Watson, District Judge, for the Middle District of Pennsylvania, and Hon. —— ——, District Judge, for the — District of —, be, and he is hereby assigned to sit in above case in order to make a full court.

Per Curiam, Joseph Buffington, Circuit Judge.

Endorsements: Order Assigning Hon. Albert L. Watson for Argument. Received & Filed Jan. 11, 1938. William P. Rowland, Clerk.

[fol. 459] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 6493. October Term, 1939

UNITED STATES OF AMERICA, Defendant-Appellant,

vs.

THE REAL ESTATE-LAND TITLE AND TRUST CO., Plaintiff-Appellee

And afterwards, to wit, the 11th day of January, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis and Honorable John Biggs, Jr., Circuit Judges, and Honorable Albert L. Watson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 13th day of March, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 460] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 6493. October Term, 1937

UNITED STATES OF AMERICA, Defendant-Appellant,

v.

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY, Plaintiff, Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION

(Filed March 13, 1939)

Before Davis and Biggs, Circuit Judges, and Watson, District Judge.

BIGGS, Circuit Judge:

The Real Estate-Land Title and Trust Company, a Pennsylvania corporation, the appellee, sued the United States in the court below for a refund of income tax. The cause of action arises out of the fact that in December, 1930, the appellee filed a claim for refund for the fiscal year ending October 31, 1928, in the sum of $153,125, alleging as the basis of its claim that it was entitled to deduct a loss due to obsolescence of a title insurance plant formerly owned by Land Title and Trust Company. The Commissioner of Internal Revenue disallowed the claim. The suit at bar was instituted pursuant to the provisions of Section 128 (a) of the [fol. 461] Judicial Code, as amended by the Act of February 13, 1925. Judgment was entered for the appellee in the sum of $107,270.81, with interest as appears. The appeal at bar is from this judgment.

The question presented for our determination is whether or not the court below erred in finding that the appellee had sustained a loss during the fiscal year commencing upon

November 1, 1927 and ending upon October 31, 1928, in the sum of $875,000, this amount purporting to represent the difference between the fair market value of the title plant upon March 1, 1913 and its value upon October 31, 1928. The trial judge found that the appellee was entitled to deduct this amount by way of obsolescence from its gross income for the fiscal year designated. The United States contends that this finding by the trial court was erroneous.

A brief statement of the facts leading to the dispute is necessary. The Real Estate-Land Title and Trust Company, the appellee, was formed by a merger between Real Estate Title Insurance and Trust Company, West End Trust Company and Land Title and Trust Company. The agreement of merger was executed upon October 3, 1927. The merger actually took place upon October 31, 1927, and the new company, the appellee, held its organization meeting upon the same day. The new company opened its doors for business upon November 1, 1927. Land Title and Trust Company prior to the merger had carried on a business of insuring titles to real estate in Philadelphia and for this reason possessed a title insurance plant. Real Estate Title Insurance and Trust Company also had carried on a title insurance business in Philadelphia and likewise possessed a title insurance plant. Prior to the merger Land Title and Trust Company carried its title plant upon its books at a valuation of $275,000, and Real Estate Title Insurance and Trust Company carried its title plant upon its books at a value of $143,000. For the purposes of the merger the value of the title plant of Real Estate Title Insurance and [fol. 462] Trust Company was appreciated by $657,000 to a total value of $800,000, and the value of the title plant of Land Title and Trust Company was appreciated by $525,000 to a value of $800,000. When the merger took place the two title plants were transferred to the appellee at a valuation of $800,000 each or at a total valuation of $1,600,000, and the appellee took the two title plants as an asset at a valuation of $1,600,000.

Up to the time of the merger Land Title and Trust Company had issued 342,067 policies of title insurance and Real Estate Title Insurance and Trust Company had issued 436,950 such policies. All of the parties to the merger knew or should have known that the new corporation, the appellee herein, would acquire two title plants designed and intended for the same purpose, namely the searching of titles of prop-

erties in Philadelphia. It appears from the evidence that the plant belonging to Land Title and Trust Company was not as efficient a plant as that belonging to Real Estate Title Insurance and Trust Company. The plant of Land Title and Trust Company could be operated effectively with approximately one-third the number of employees required by the other.

A witness for the appellee testified that at the time the merger agreement was signed there was no plan for the disposition of the two plants. After the execution of the merger agreement but prior to the actual consummation of the merger an officer of the Land Title and Trust Company and an officer of the Real Estate Title Insurance and Trust Company examined the title plants and looked into the situation created by possession of two such units. Following this examination, it was decided that the appellee would use the title plant formerly belonging to the Real Estate Title Insurance and Trust Company and the plant formerly belonging to Land Title and Trust Company should be stored. The daily records required to keep the plant up to date were not made after this inspection. The record shows that this failure to keep the plant to date occurred no later than Oc- [fol. 463] tober 31, 1927 and probably took place a few days earlier. The plant however was used in connection with certain sheriff's sales occurring on the first Monday in November, 1927, and certain other information was obtained from this plant and made use of by the appellee from time to time for a period of some weeks thereafter. There is no evidence, however, to show that the plant was used in connection with new searches of properties after October 31, 1927.[1]

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[1]The testimony of the title officer of Land Title and Trust Company is illuminating. He testified:

"A. The only use made of them (the records in the plant) in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time,

The plant was stored in the basement of a building occupied by the appellee at 517 Chestnut Street, between the second week in October and the end of the first week in November, 1927. Shortly after the consummation of the merger, the plant was offered for sale by the appellee for a price of $1,000,000, but no offer to purchase it was received by the appellee in any amount. It appears also that during the [fol. 464] first year after the merger it would have been necessary to have made 227,498 entries in the records of the plant in order to keep it up to date. At the time of the merger there were three title plants in Philadelphia and the appellee acquired two of them by the merger.

The pertinent statute, Section 23 of the Revenue Act of 1928, c. 852, 45 Stat. 791, is as follows:

"Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * *

(k) Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Deductions from gross income cannot be made for obsolescence or depreciation of property unless used in the trade or business of the taxpayer in the taxable year in question. The trial court reached the conclusion that the plant had been used by the appellee within the meaning of the statute. That use at most was very slight. Assuming, how-

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after the first of November, when the new company went into operation, what references may have been made from time to time to that plant.

"Q. You do know that they looked up some things from time to time?

"A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

"Q. Did they increase or decrease after the plant was stored there?

"A. I think that it decreased as the time went by, so that there was practically little or no use made of it by the end of the year following the merger."

ever, that the use by the appellee of the plant was sufficient to come within the purview of the statute, it then becomes necessary to determine whether or not the sum of $875,000 claimed by the appellee as deduction from its gross income is a reasonable allowance for obsolescence and whether in fact there was obsolescence.

The fact of the matter is that the appellee, following the merger, had two title plants upon its hands each designed to accomplish substantially the same work. It was economically undesirable to make use of both. The appellee therefore selected and made use of that plant which it felt could be most economically operated. It thereupon failed to keep the other plant up to date by placing the necessary entries in its files. At any time during the taxable year the [fol. 465] appellee by the expenditure of funds not incommensurate with the value placed upon the plant at the time of the merger, $800,000, or the price at which it was offered for sale after the merger, $1,000,000, could have brought the plant to date and could have rendered it commercially useful as theretofore. In the case at bar the basis offered for obsolescence is really that of the duplication of property.

Obsolescence is always difficult to define. In Burnet v. Niagara Brewing Co., 282 U. S. 648, 653, 654, Mr. Justice Butler, construing Section 234 (a) (7) of the Revenue Act of 1918, 40 Stat. 1078, stated, "The word is much used and its meaning depends upon and varies with the connections in which it is employed. It has been said to be 'the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions.' Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes." In United States Cartridge Co. v. United States, 284 U. S. 511, 516, Mr. Justice Butler, construing the same section, stated, " 'Obsolescence' may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value." In Gambrinus Brewery Co. v. Anderson, 282 U. S.

638, 645, he stated again, referring to Section 234 (a) (7), "The statute contemplates annual allowance for obsolescence just as it does for exhaustion, wear and tear. That is necessary in order to determine true gain or loss because postponement of deductions to cover obsolescence until the property involved became obsolete would distort annual income. It is well understood that exhaustion, wear, tear or obsolescence cannot be accurately measured as it progresses [fol. 466] and undoubtedly it was for that reason that the statute authorized 'reasonable' allowances to cover them in order equably to spread that element of operating expenses through the years."

Obsolescence has been said to be "* * * the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions * * *" and "* * * the state or process of becoming obsolete". Law of Federal Income Taxation, Paul & Mertens, Vol. 2, Section 20.110, citing First National Bank of Key West, 26 B. T. A. 370. Obsolescence is not always subject to accurate measurement as it progresses. It was for this reason that the word "reasonable" was inserted in the statute, permitting the losses occuring by reason of obsolescence to be spread over the years between the beginning and end of the process.

In the light of the definitions of obsolescence set forth above, we perceive the purpose of the statute, granting a reasonable allowance by way of obsolescence to the taxpayer, to be the allowance to the taxpayer of deductions based upon plant, machinery or equipment becoming inutile due to changing competitive conditions, improvements resulting from invention, or from prohibitory statutes. The object of the statute is to permit a taxpayer to regain capital invested by him in an enterprise, the equipment, machinery or material in which his capital has been placed becoming obsolete, because time itself brings improvements or changed conditions. To put the matter shortly, obsolescence may be claimed when machinery or a plant suffers loss in use not because of action or lack of it upon the part of the taxpayer, but because of the effect of general conditions over which he has no control.

We think it is apparent that the loss claimed by the taxpayer cannot be brought within any established definition of obsolescence. The title plant did not lose its usefulness because of changing economic conditions or by reason of

any circumstances over which the taxpayer lacked control. [fol. 467] Such usefulness as was lost throughout the taxable year in question was lost because of the failure of the taxpayer to keep the plant's records up to date. To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view. Indeed, there is express evidence to the contrary in view of the fact that the plant in question was offered for sale for the sum of $1,000,000 some months after November 1, 1927. Moreover, we think that in a true sense the deterioration suffered by the plant in the period from November 1, 1927, to October 31, 1928, was physical deterioration, and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Co. v. United States, supra. The loss suffered by the appellee within the taxable year is more closely allied to depreciation, which, continued from year to year thereafter, might result upon some future date in a complete loss of value in the plant. Such complete loss would occur when the cost of bringing the plant to date would exceed the value of the existing records in the plant. This is all the more apparent when it is observed as was testified to at the trial in the case at bar that a complete title insurance plant consists of the following parts: first, abstracts of public records, including deeds, mortgages, sheriff's assignments, releases and so forth, indexed, plotted and located on plans of the City as subdivided into sections and blocks; and, second, separate abstracts of title, searches and opinions in each matter for which the title company had issued its title insurance policy or obligation of a similar nature.

In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee. [fol. 468] The situation presented is analogous to that which would occur if a public utility company with adequate power facilities of its own bought out a competing utility operating in the same territory, and thereafter, making no use of the power plant purchased and not maintaining it

in running order, claimed its value, less scrap value, by way of obsolescence within the taxable year after its acquisition. It is obvious that obsolescence cannot be maintained upon such a basis.

It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence. In the suit at bar therefore the appellee might be permitted to take only the deduction which it claimed. Such is the basis upon which the United States consents to be sued. See Rock Island, Arkansas & Louisiana R. R. Co. v. United States, 254 U. S. 141; Reid v. United States, 211 U. S. 529, 538; Munro v. United States, 303 U. S. 36, 41. We may state, however, that the circumstances of the case at bar seem to us to be closely analogous to those presented in Newspaper Printing Co. v. Commissioner, 56 F. (2nd) 125, decided by this court.

In conclusion we state that the amount of the deduction allowed to the taxpayer by the court below seems to us to be not supported by the evidence. Two experts, testifying on behalf of the appellee, stated that the value of the title plant as of March 1, 1913, was between $1,000,000 and $1,250,000. Yet it was carried upon the books of the Land Title and Trust Company in the sum of $275,000, which at the time of the merger was increased to $800,000. Within some months following the merger a price was set upon the plant of $1,000,000. None the less it was found as a fact by the court below that the loss to the appellee by way of the obsolescence of the plant, less scrap value, was [fol. 469] $875,000. This is $75,000 more than the value at which the plant was taken into the merged corporation and more than three times the value at which the plant was carried upon the books of the constituent company just prior to the merger.

The judgment of the court below is reversed and the cause is remanded with the direction to enter judgment in favor of the defendant-appellant.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

2—2641

[fol. 470] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 6493. October Term, 1937

UNITED STATES OF AMERICA, Defendant-Appellant,

vs.

REAL ESTATE-LAND TITLE AND TRUST CO., Plaintiff-Appellee

On appeal from the District Court of the United States, for the —— District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and the cause remanded to the said District Court with direction to enter Judgment in favor of the defendant-appellant.

Philadelphia, March 13, 1939.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Reversing Judgment etc. Received & Filed Mar. 13, 1939. William P. Rowland, Clerk.

[fol. 488] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 6493. October Term, 1937

UNITED STATES OF AMERICA, Appellant,

vs.

REAL ESTATE LAND TITLE & TRUST CO., Appellee

Sur Petition for Rehearing

And Now, to wit May 1, 1939, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— ——.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed May 1, 1939. William P. Rowland, Clerk.

[fol. 489] UNITED STATES OF AMERICA:

EASTERN DISTRICT OF PENNSYLVANIA, THIRD JUDICIAL CIRCUIT, Sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of United States of America, Defendant-Appellant, vs. Real Estate-Land Title & Trust Co., Plaintiff-Appellee. No. 6493 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of June in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the one hundred and sixty-third.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 490] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler, Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration and decision of this application.

Endorsed on Cover: File No. 43,636 U. S. Circuit Court of Appeals, Third Circuit, Term No. 229. The Real Estate-Land Title and Trust Company, Petitioner, vs. The United States o. America. Petition for a writ of certiorari and exhibit thereto. Filed July 26, 1939. Term No. 229 O. T. 1939.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. **No. 229**

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAURICE BOWER SAUL,
Counsel for Petitioner.

JOSEPH A. LAMORELLE,
JOSEPH NEFF EWING,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

JULY 24, 1939.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. No.

The Real Estate-Land Title and Trust Company,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Real Estate-Land Title and Trust Company, petitioner herein, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the judgment of that court entered in this case on March 13, 1939, re-hearing denied May 1, 1939, and therefore shows as follows:

I. SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner is a corporation created by the merger of three other corporations, namely, the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company, all of which formerly carried on business in the City of Philadelphia. The merger of these three companies became effective October 31, 1927, and the new corporation opened for business the following day. Negotiations for the said merger were first entered into by the Real Estate Title Insurance and Trust Company and the West End Trust Company, which companies agreed on a two-company merger. The Land Title and Trust Company was not considered as a party to the merger until the latter part of September, 1927, about two weeks before the merger agreement was signed (R. 421-22).

Before the above-mentioned merger two of the companies, viz., the Real Estate Title Insurance and Trust Company, and the Land Title and Trust Company, each owned a title plant used in its respective business of insuring titles to real estate. Both of these title plants were acquired by petitioner at the time of the merger. When the merger agreement was signed there was no definite plan for the use or disposition of the two title plants (R. 48). The Land Title and Trust Company came into the merger negotiations at such a late date that there was not time to give much consideration to the practical operation of the two plants, nor what disposition should be made of either or both of them (R. 48-49). It was the idea of the President of the new company that the plant of the Land Title and Trust Company should be used by the new company in carrying on its title business (R. 49). It was not until the negotiations for the merger had been completed, and the agreement signed by all three companies, that the question arose as to what would be done with the two title plants (R. 48).

An officer of The Land Title and Trust Company and

an officer of the Real Estate Title Insurance and Trust Company were appointed to examine into the situation. After their report was submitted it was decided that the new corporation (petitioner herein) should commence operations using the title plant of the Real Estate Title Insurance and Trust Company, and that the title plant of the Land Title and Trust Company should be stored and held in reserve (R. 49 and 423). It was not considered economical to keep both title plants up-to-date by daily additions thereto, until it was determined that both title plants would be needed in the business of the new corporation (R. 49-50).

The title plant of the Land Title and Trust Company was used in connection with Sheriff's sales occurring the first Monday of November, 1927, and other information was obtained from this plant and used by the petitioner for several weeks thereafter (R. 49-52). Within a couple of months after the merger it was definitely determined that the title plant formerly owned by the Real Estate Title Insurance and Trust Company would be sufficient for the purposes of petitioner's business, and at that time there was a virtual abandonment of the title plant formerly owned by the Land Title and Trust Company (R. 423-24).

The abandoned plant was in the market for sale and would have been sold had a reasonable offer been received. A price of $1,000,000 was quoted on it, but no offer in any amount was received (R. 50-51). No additions were made to this plant at any time after the merger, and as time went on the plant became more and more out of date due to the fact that it was not being kept up by daily additions thereto. During the first year after the merger it would have been necessary to enter in the records of this title plant, a record or notation of 227,498 documents to keep it up-to-date (R. 152). The dismantled title plant was stored in the basement of premises 517 Chestnut Street, where it was still housed at the time of the trial of this case (R. 51).

Petitioner brought suit against the United States in the District Court of the United States for the Eastern District of Pennsylvania, wherein petitioner claimed that in determining its net income subject to tax for the fiscal year ending October 31, 1928, it was entitled to a deduction in the amount of $1,250,000 due to the fact that the title insurance plant then owned by petitioner, but formerly owned by the Land Title and Trust Company, became obsolete and was abandoned during the said year, and claimed a refund of income tax for the said year in the amount of $153,125. This suit was started after petitioner's claim for refund had been disallowed by the Commissioner of Internal Revenue. The case was tried in the District Court on February 2nd and 3rd, 1937, by a Judge without a jury.

Petitioner proved at the trial that the title plant formerly owned by The Land Title and Trust Company was not worth over $125,000 on October 31, 1928, a year after the merger, and that it had been worth a minimum of $1,000,000 on March 1, 1913 (R. 109, 111, 148 and 425). No depreciation or obsolescence had ever been claimed or allowed upon the said title plant from the time it was originally built by the Land Title and Trust Company up to the date of the merger.

The Trial Judge found that this title plant became obsolete prior to October 31, 1928, that petitioner had sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in the amount of $875,000 representing the difference between the fair market value of this title plant on March 1, 1913, and its value on October 31, 1928 (R. 424-425), and concluded that the petitioner was entitled to deduct this amount in determining its net taxable income for the fiscal year ending October 31, 1928 (R. 429).

Judgment was entered in the District Court in favor of petitioner and against the United States on March 31, 1937, in the amount of $107,270.71 with interest, representing the amount of the overpayment of income tax

by petitioner for the year in question, and from this judgment the United States appealed to the Circuit Court of Appeals for the Third Circuit.

The case was argued in the Circuit Court of Appeals on January 11, 1938, before Hon. J. Warren Davis and Hon. John Biggs, Jr., Circuit Judges, and Hon. Albert L. Watson, District Judge, and fourteen months later, to wit, on March 13, 1939, an opinion was filed by the Hon. John Biggs, Jr., reversing the judgment of the District Court. On the 11th day of April, 1939, a petition for rehearing was filed in the Circuit Court of Appeals, which petition was denied on May 1, 1939.

II. BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

(*a*) This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U. S. C. A. Section 347.

(*b*) The Statute of the United States involved in this proceeding is the Act of Congress known as the Revenue Act of 1928, approved May 29, 1928 (c. 852, 45 Stat. 795), the pertinent provisions of which are set forth in the Appendix to the Brief annexed hereto (pp. 43-45).

(*c*) The judgment of the Circuit Court of Appeals for the Third Circuit now sought to be reviewed was entered by the said Court on March 13, 1939 (R. 467). Petition for Rehearing was filed on April 11, 1939, within the time provided by the Rules of the said Circuit Court of Appeals (R. 468), and the said Petition for Rehearing was denied on May 1, 1939 (R. 485).

III. STATEMENT OF QUESTIONS PRESENTED.

1. Whether or not petitioner is entitled to a deduction for obsolescence of a title plant in determining net

income subject to Federal income tax for the fiscal year ending October 31, 1928.

2. Whether or not it was proper for the Circuit Court of Appeals in this case to direct the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge.

3. Whether under the claim for refund filed in this case, petitioner is entitled to a deduction on account of the abandonment of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals in the instant case has decided an important question of Federal law, namely, that where a title plant is not kept up-to-date by daily additions thereto; the plant is not the subject of obsolescence for purposes of Federal income tax. This decision by the Circuit Court of Appeals for the Third Circuit is in direct conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit in the case of *Crooks, Collector, v. Kansas City Title and Trust Company*, 46 Fed. (2d) 928.

In the Crooks case the taxpayer acquired six abstract companies "each having an abstract plant." Four of these plants were found upon trial to be ineffective. There was evidence to the effect that some if not all of the books and indices of these four plants were discarded and stored in vaults. In 1921 the officers of the corporation determined that the said four plants would become obsolete within nine or ten years. The corporation claimed the right to deduct for income tax purposes annually from 1921 to 1930 a certain amount representing obsolescence of the said abstract plants. It appears that in that case the Collector advanced somewhat

similar arguments to those advanced by the United States in the instant case, namely, that when the taxpayer "'bought the assets of the four companies it knew they were inefficient and of no use; that it did not intend to use them and did not use them; that it bought the useless to get the useful; that the evidence shows the books were not used in the company's business, and had no part in the production of revenue for any year; * * *'' The Circuit Court of Appeals for the Eighth Circuit in the *Crooks* case held that the taxpayer was entitled to a deduction for obsolescence of the abstract plants which it had acquired and found ineffective.

It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the *Crooks* case, as each of these courts had before it substantially the same question.

2. Petitioner herein respectfully submits that the United States Circuit Court of Appeals for the Third Circuit in reversing the judgment of the lower court in this proceeding, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, for the following reason:

The Trial Judge in the District Court filed very complete Findings of Fact and Conclusions of Law. He found as facts, *inter alia:*

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November, 1927 (Finding No. 15, R. 422).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 423).

(*c*) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 423).

(*d*) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 423).

(*e*) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 422).

(*f*) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed (Finding No. 21, R. 423-24).

(*g*) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 424).

(*h*) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust

Company and the fair market value of the said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 425).

Notwithstanding the above findings, His Honor, Judge Biggs, of the Circuit Court of Appeals in his opinion stated:

> "To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view."

The learned Trial Judge had before him two credible witnesses of great experience in the operation and value of title plants, namely, Henry R. Robins, President of the Commonwealth Title Company of Philadelphia, and Pierce Mecutchen, Title Officer of the Land Title Bank and Trust Company, also of Philadelphia. These men are well known and have had vast experience in the title insurance business in the City of Philadelphia. They were subject to cross examination by counsel for the Government, and the findings of the Trial Judge were made after hearing their testimony both on direct and cross examination. There is ample evidence to support the findings of the Trial Judge.

The holding of the Circuit Court of Appeals is directly contrary to the findings of fact in the lower Court as set forth in paragraphs (*g*) and (*h*) above, and since there is ample evidence to support these findings,

it is submitted that this action by the Circuit Court of Appeals constitutes such departure from the accepted and usual course of judicial proceedings as to call for the exercise of supervision by this Honorable Court.

3. In his opinion His Honor, Judge Biggs, of the Circuit Court of Appeals, states, *inter alia:*

> "In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee."
>
> * * * * * * *
>
> "It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of a taxpayer's claim and afford the Commissioner an opportunity of correcting errors made by his office. *Tucker* v. *Alexander,* 275 U. S. 228. In the instant case the Deputy Commissioner of Internal Revenue in his communication to the petitioner under date of February 11, 1931, advising petitioner that its claim for refund would be rejected, said in part as follows:

> "Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned:*" (Italics ours).

This quotation shows clearly that the question of abandonment was considered by the Commissioner of

Internal Revenue in connection with petitioner's claim for refund.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year."

In its answer the United States denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the court should determine that the plant had been abandoned; nor was this question raised by the Government at the trial of this case.

It is submitted that the claim for refund is sufficient for the allowance of the deduction claimed by petitioner, on the theory of either obsolescence or abandonment.

In holding that there was an abandonment of a capital asset in this case but that the petitioner cannot claim a deduction on this ground "because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence," the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Honorable Court of its power of supervision.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment

of the Circuit Court of Appeals for the Third Circuit should be granted.

And your petitioner will ever pray, etc.

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,
By
MAURICE BOWER SAUL,
Counsel for Petitioner.

JOSEPH A. LAMORELLE,
JOSEPH NEFF EWING,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

Philadelphia, Pa.

Dated July 24, 1939.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The Opinion of the Circuit Court of Appeals is reported in 102 Fed. (2d) 582. It will be found on pages 459-466 of the Record. The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge in the District Court will be found on pages 410 to 437 inclusive of the Record.

JURISDICTION.

1. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. Section 347.

2. The judgment of the Circuit Court of Appeals was entered on March 13, 1939 (R. 467). Petition for rehearing was filed April 11, 1939, within the time provided by the Rules of the Circuit Court of Appeals (R. 468), and the petition for rehearing was denied on May 1, 1939 (R. 485).

3. The nature of the case, the rulings of the District Court and the Circuit Court of Appeals for the Third Circuit, and the reasons why a writ of certiorari should be granted, are set forth in the foregoing petition.

4. The grounds upon which the writ is asked are two of the reasons set forth in Rule 38 5(b) of the Rules of your Honorable Court as follows:

(*a*) The Circuit Court of Appeals for the Third Circuit has rendered a decision involving a Federal question, which decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Crooks v. Kansas City Title and Trust Company*, 46 Fed. (2d) 928, and

(*b*) The Circuit Court of Appeals for the Third Circuit in its decision in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Honorable Court of its power of supervision.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

The petition for the writ of certiorari contains a statement of the case and of the questions involved, as well as a statement of the facts material to their consideration. In the interest of brevity the questions involved and material facts are not repeated here.

STATUTES INVOLVED.

The relevant provisions of the Revenue Act of 1928 (45 Stat. 795) are set forth in the Appendix hereto at pages 43-45.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the title plant of the Land Title and Trust Company could be operated effectively with approximately one-third the number of employees required to operate the plant formerly owned by the Real Estate Title Insurance and Trust Company.

2. The Circuit Court of Appeals erred in holding that there is no evidence to show that the title plant of the Land Title and Trust Company was used in connection with new searches of properties after October 31, 1927.

3. The Circuit Court of Appeals erred in holding that "the basis offered for obsolescence is really that of the duplication of property."

4. The Circuit Court of Appeals erred in holding that the loss claimed by the taxpayer cannot be brought within any established definition of obsolescence.

5. The Circuit Court of Appeals erred in holding that it is contrary to the facts to hold that the title plant formerly owned by the Land Title and Trust Company became obsolete within the taxable year.

6. The Circuit Court of Appeals erred in disregarding the findings of the District Court and in holding that it is contrary to reason to conclude that a title plant created between the years 1886 and 1887 and steadily added to and kept up-to-date until October 1927, loses its usefulness in the following twelve months because of the failure to add current notations to its records, and that there is no adequate evidence of record in the case at bar to sustain such a view.

7. The Circuit Court of Appeals erred in holding that the deterioration suffered by the title plant in the period from November 1, 1927 to October 31, 1928, was physical deterioration and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Company *v.* United States, 284 U. S. 511.

8. The Circuit Court of Appeals erred in holding that obsolescence cannot be maintained upon the basis claimed in the case at bar.

9. The Circuit Court of Appeals erred in holding that the taxpayer is not entitled to the deduction claimed in this proceeding on the theory of abandonment because the claim for refund by taxpayer "was asserted by it solely upon the ground of obsolescence."

10. The Circuit Court of Appeals erred in holding that the amount of deduction allowed to the taxpayer by the District Court was not supported by the evidence.

11. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

12. The Circuit Court of Appeals erred in directing the entry of a judgment for the respondent.

13. The Circuit Court of Appeals erred in entering the following judgment:

> "The judgment of the court below is reversed and the cause is remanded with the direction to enter judgment in favor of the defendant-appellant."

ARGUMENT.

We will discuss the legal questions involved in this proceeding under the following headings:

1. A Title Plant is Properly Subject to Obsolescence and the Decision of the Circuit Court of Appeals for the Third Circuit in This Case is in Direct Conflict With the Decision of the Circuit Court of Appeals for the Eighth Circuit in the Case of Crooks, Collector, v. Kansas City Title and Trust Company, 46 Fed. (2d) 928.

2. There is Ample Evidence to Sustain the Findings of Fact of the Trial Judge.

3. The Findings of Fact of the Trial Judge are Conclusive, and Fully Sustain His Conclusions of Law.

4. The Petitioner is Clearly Entitled to a Deduction Because of the Abandonment of a Capital Asset.

1. A Title Plant is Properly Subject to Obsolescence, and the Decision of the Circuit Court of Appeals for the Third Circuit in This Case is in Direct Conflict With the Decision of the Circuit Court of Appeals for the Eighth Circuit in the Case of Crooks, Collector, v. Kansas City Title and Trust Company, 46 Fed. (2d) 928.

From the evidence it is clear that the title plant formerly owned by the Land Title and Trust Company was not kept up-to-date by daily additions thereto after October 31, 1927.

Judge Biggs, of the Circuit Court of Appeals, in his opinion states:

> "Moreover, we think that in a true sense the deterioration suffered by the plant in the period from November 1, 1927, to October 31, 1928, was physical deterioration, and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Co. *v.* United States, *supra.* The loss suffered by the appellee within the taxable year is more closely allied to depreciation, which, continued from year to year thereafter, might result upon some future date in a complete loss of value in the plant."

From the above holding it is clear that Judge Biggs is of the opinion that there was certain deterioration suffered by the title plant during the period November 1, 1927, to October 31, 1928, but that such deterioration may not be claimed as obsolescence. Judge Biggs admits that there was a loss suffered by the taxpayer within the taxable year, but states that such loss is more closely allied to depreciation.

It is submitted that the holding by the Circuit Court of Appeals in this case is in direct conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit, in *Crooks, Collector,* v. *Kansas City Title and Trust Company, supra, wherein it was held that abstract plants acquired by the taxpayer and not kept up-to-date because found upon trial to be inefficient, were the proper subjects of obsolescence.* In the opinion of Judge Kenyon in the *Crooks* case we find the following (p. 929):

> "The real complaint of appellant is that notwithstanding complete obsolescence in 1930 was deter-

mined in 1920, under this record the amount to be set aside for such obsolescence is impossible of determination and that the court's allowance is wrong. As a jury was waived in writing we are limited to the questions as to whether there was substantial evidence to sustain the findings of fact and whether they support the judgment."

* * * * * * *

"The deduction under the law is a reasonable allowance for exhaustion, wear and tear of property used in the business, including a reasonable allowance for obsolescence. Revenue Act 1921, c. 136, sec. 234(a), 42 Stat. 227, 256."

"The Treasury Department through the Bureau of Internal Revenue has laid down the rule as to obsolescence of abstract plants under section 234(a), c. 136, 42 Stat. 227, 256, in a ruling as follows:

"'The cost of an abstract plant, found upon trial to be inefficient and to which additions were not made in order to keep it up-to-date, may be recovered through depreciation or obsolescence allowances.'

"The opinion as set forth in I. T. 1775 Internal Revenue Cumulative Bulletin is as follows:

"'In 1921 the taxpayer purchased the abstract plant of the M. Company. At the time this plant was purchased it was thought it could be used to advantage in the abstract and title guaranty work of the taxpayer but was found upon trial to be inefficient and the records in part a duplication of the records of the taxpayer. It was then decided not to continue additions thereto from day to day in order to keep it up-to-date.

"'Advice is requested as to whether the taxpayer may take as a deduction depreciation sustained to the plant in view of the fact that it has

not been added to or kept up-to-date since its purchase.

"'Held, that it is a proper case for depreciation or obsolescence allowances and the cost of the plant less the salvage value thereof should be spread equally over the period from the date the permanent abandonment of the plant was foreseen to the date of the permanent abandonment and deductions allowed each year in such amounts for income tax purposes.'"

* * * * * * *

"There was substantial evidence to sustain the findings of fact by the court, and the conclusions of law are amply supported by such findings. The judgment is affirmed."

It is submitted that the question as to whether or not a title plant which is not kept up-to-date by daily additions thereto can be the subject of an allowance for obsolescence, is an important question of Federal law, and since there are conflicting decisions in two circuits, the question should be reviewed and definitely decided by this Honorable Court.

2. There is Ample Evidence to Sustain the Findings of Fact of the Trial Judge.

The learned Trial Judge filed, *inter alia*, the following Findings of Fact:

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November of 1927 (Finding No. 15, R. 422).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 423).

(*c*) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 423).

(*d*) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 423).

(*e*) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 422).

(*f*) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed (Finding No. 21, R. 423-24).

In support of the above Findings we respectfully refer to the testimony of J. Willison Smith, President of the petitioner, wherein the following appears (R. 49, 50, 51 and 52):

"Mr. Bonsall was requested to take up the subject and make a report, which he did, in the latter part of October, toward the end of October, 1927. I don't recall definitely who worked with Mr. Bonsall, but I think Mr. Mecutchen, who was the title officer, worked with Mr. Bonsall on that report, and they studied the situation with the Real Estate Title

officers (Tr. 21-22). The report was that from the practical standpoint, and an economical standpoint, the Real Estate Title plant should be tested out and determine whether the economy would make it worth while to continue that plant and not use—until that trial period was over—anything in the way of the Land Title plant. The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of the coming month, the month of November, and I think December, although I can't say definitely on that. Economy of operation of the Real Estate Title plant was so convincing that it was definitely determined later that the plant of the Real Estate Title should be the working plant. The plant of the Land Title had been placed in the basement of 517 Chestnut Street, which was the old office of the Real Estate Title Insurance and Trust Company, and now the downtown office of the Land Title Bank and Trust Company.

"We did not keep the Land Title plant up-to-date. It was allowed to run down, as far as keeping it up to the daily records, and judgments and plans and abstracts from the daily records, and so forth (Tr. 23).

"Q. At what time did you start to allow the Land Title plant to go down?

"A. Well, my recollection was about the time of the latter part of October, about that time. But parts of the Land Title plant were used during the early part of November, as I recall it, of 1927, to take care of some situations which were necessary at that particular time of the month.

"Q. In other words, I understood that you testified that they continued to use it, but did they continue to keep up the records in it?

"A. No, they did not.

"Q. From sometime, you say, in the latter part of October?

"A. That is correct" (R. 49-50).

* * * * * * *

"Q. What was the ultimate disposition of that plant?

"A. It is still there without use, without practically any use.

"Q. When did you cease to use it?

"A. I don't believe that plant has been used—of course I did not actually physically handle the situation, but to the best of my recollection it hasn't been used since 1928, early part of 1928" (R. 51-52).

The testimony of Mr. Mecutchen is in part as follows (R. 74, 76, 83 and 84):

"Q. Mr. Smith testified that Mr. Bonsall and Mr. Cowdrick took up the question of which of the two title plants would be used by the new company. Were you associated with Mr. Bonsall in that work?

"A. I went around with him and Mr. Cowdrick. We were shown the various operations that went on in the Real Estate Title plant and the character of its conditions; Mr. Cowdrick asking some questions that were asked by us, particularly by Mr. Bonsall. And it was after that it was concluded to try out the Real Estate Title plant as being the preferable one to use from the standpoint of economy and probably also from the standpoint of speed" (R. 74).

* * * * * * *

"Q. Then I understand you came to the conclusion to use the Real Estate Title plant on account of economy of operation?

"A. Yes, sir; that is true.

"Q. And what happened to the Land Title plant?

"A. The Land Title plant was taken down to 517 Chestnut Street, and the larger part of it was stored in the basement, some portions of it were kept elsewhere. I think the block plan books were not stored in the basement, but everything else of any importance, that I know of, was stored down there" (R. 76).

* * * * * * *

"Q. And what happened to them after they were put there? Were they used or not?

"A. The only use made of them in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation, what references may have been made from time to time to that plant (Tr. 66).

"Q. You do know that they looked up some things from time to time?

"A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

"Q. Did they increase or decrease after the plant was stored there?

"A. I think that it decreased as the time went by, so that there was practically little or no use made of it by the end of the year following the merger" (R. 83-84).

Mr. Mecutchen testified that the number of entries which would have been made in the title plant of the Land Title and Trust Company for the year beginning November 1, 1927, and ending October 31, 1928, had the said title plant been kept up-to-date during that period, would have totaled 227,498 as follows (R. 151-152):

"From November 1st, 1927 to October 31st, 1928, inclusive, there were 54,419 mortgages; 62,710 deeds, 19,963 assignments; 2,031 releases; 38,207 judgments; 47,075 liens, including more particularly mechanics and municipal claims; and United States District Court judgments, 1,944; and bankruptcies, 1,149."

The learned Trial Judge also found as follows:

(*g*) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 424).

The above finding is supported by the following testimony of Henry R. Robins, President of the Commonwealth Title Company of Philadelphia (R. 113-114, and 139-140):

"Q. Let me ask you to say what the difference was in the plant after it had been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928? (Tr. 105.)

"The Witness:—It would have a continuous depreciation from October 31, 1927, down to 1928; that depreciation rapidly increasing as time went on. In the early part of 1928 the depreciation of the value of that plant would not be so great as at the end of the year, and as you got near the end of the

year it would go down at a greater rate. So it would be pretty nearly valueless at the end of the year, for the expense of bringing it up to date would have been so great that no one would have thought—no sane man in business would have thought of buying that plant and going to the expense of bringing it up to date.

"By Mr. Ewing:

"Q. That is a year after it had been stored?

"A. A year after it had been stored. In the early part of the year the expense of bringing it up to date would not have been so great.

"Q. What other elements do you take at fixing the value as of October 31, 1928, beside the cost of bringing the plant up to date?

"A. The question of marketability.

"Q. How would that be affected?

"A. Why, greatly. Any asset of any kind which is discarded, allowed to deteriorate, and then attempted to be sold as a second-hand used article, depreciates in value; and the title plant does, in the same way, the same as the ordinary" (R. 113-114).

* * * * * * *

"Q. Well now, what effect, as far as the value of the plant is concerned, taking it out of use and storing it down in the basement, would it have on the plant?

"A. It would deteriorate most rapidly (Tr. 135, 136).

"Q. You testified it would deteriorate from not being kept up. Would that have any other effect on possible purchasers of the plant?

"A. It certainly would. Possibly a purchaser of anything in the way of a second-hand article is going to figure, as Mr. Mecutchen brought out, what it is going to cost to bring it up. It is a second-hand article. He can go and buy a cheaper new article of a modern make that will answer his purpose just as

well, and he is not going to buy a second-hand article that he has got to spend money on, if he can buy something else that answers his purpose, cheaper, and is not anything as good.

"Q. And was it known the reason this was discarded for The Real Estate-Land Title plant was on account of its high cost of operation?

"A. Yes. Throughout all title circles of Philadelphia where there was a possible market for this plant everyone knew that the Land Title's plant had been discarded and the Real Estate Title plant was the one that was going to be used.

"Q. And they knew the reason for it?

"A. Every title company in town knew it, and every company in town knew the reason why, on account of the expensive mode of operation. It was discussed at title meetings; representatives of title companies talked it over" (R. 139-140).

The learned Trial Judge also found as follows:

(*h*) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and the fair market value of the said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 425).

In Mr. Mecutchen's testimony we find the following (R. 148):

"Q. You were familiar, of course, in your testimony yesterday, with the plant of the Land Title and Trust Company, where you were working on March 1st, 1913?

"A. Yes (Tr. 147).

"Q. What, in your opinion, was the fair value of that title plant at that time?

"A. I think it was worth, in my opinion, a million dollars.

"Q. And you were equally familiar with the plant on October 31, 1928, a year after the merger? What in your opinion—your answer to that is yes?

"A. Yes, that is true.

"Q. What, in your opinion, was the fair value of the plant at that time?

"A. Not over a hundred to $125,000."

In this connection Mr. Robins testified as follows (R. 109 and 111):

"Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st, 1913?

"The Witness:—March 1st, 1913, I would say I am of the opinion that the title plant of the Land Title and Trust Company was worth one million and a quarter dollars" (R. 109).

* * * * * * *

"Q. I am asking you now, under the conditions which you heard testified to yesterday by Mr. Mecutchen, what, in your opinion, was the fair value of that plant as it was a year after the merger in October 31, 1928?

"A. It was worth just about what you could get for it. I would not believe you could have gotten over $100,000 at the outside.

"Q. Then, in your opinion, the outside fair value of the plant on October 31, 1928, would be $100,000?

"A. About $100,000. Somewhere between fifty and a hundred. You couldn't find a purchaser for that" (R. 111).

It is submitted that the foregoing quotations from the Record in this case clearly prove that there was ample testimony to support the findings of the Trial Judge.

3. The Findings of Fact of the Trial Judge are Conclusive, and Fully Sustain His Conclusions of Law.

This proceeding was instituted under the Tucker Act, which in Section 7 thereof (28 U. S. C. A. Section 764) provides in part as follows:

> "It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge are set forth at length on pages 410 to 437 inclusive of the Record.

It is clear from the argument under the preceding heading that there is ample evidence to support the Findings of the Trial Judge, *and since this is so the Findings of the Trial Judge are conclusive.* The only remaining question then is whether or not the Conclusions of Law of the Trial Judge are supported by his Findings of Fact.

In *United States* v. *Buffalo Pitts Company,* 234 U. S. 228 (1914), a proceeding instituted under the Tucker Act in which this question arose, Mr. Justice Day in his opinion stated, at 232:

> "In cases brought under this act coming up from a District or Circuit Court of the United States *the findings of fact of the trial court are conclusive,* and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States,* 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by any evidence whatever (*Collier* v. *United States,* 173 U. S. 79)." (Italics ours.)

In *Chase* v. *The United States*, 155 U. S. 489 (1894), Mr. Justice Harlan stated in his opinion, at page 500:

> "But under that Act [the Tucker Act] a judgment of a District or Circuit Court of the United States in an action at law brought against the Government, will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this Court will only inquire whether the judgment below is supported by the facts thus found."

See also *Wessel, et al.* v. *United States*, 49 Fed. (2d) 137 (C. C. A. 8th Cir. 1931), and *United States* v. *Union Trust Co. of Indianapolis, et al.*, 90 Fed. (2d) 702 (C. C. A. 7th Cir. 1937), both of which arose under the Tucker Act and involved claims for refund of tax.

In the *Wessel* case Judge Kenyon in his opinion states (p. 139):

> "The special findings of fact by the trial court have the same effect as the verdict of a jury. Cramp *v.* United States, 239 U. S. 221, 36 S. Ct. 70, 60 L. Ed. 238; Crocker v. United States, 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533; Brothers *v.* United States, 250 U. S. 88, 39 S. Ct. 426, 63 L. Ed. 859; Stone *v.* United States, 164 U. S. 380, 17 S. Ct. 71, 41 L. Ed. 477."

In the *Union Trust Company* case Judge Major in his opinion states (p. 703):

> "It is not the province of this court to weigh the evidence or analyze the same except to the extent of ascertaining if the ultimate fact found by the trial court is supported by *any* evidence." (Italics ours.)

And again (p. 703):

> "While there is evidence in the record inconsistent with such ultimate finding by the trial court and

evidence from which a contrary conclusion might be reached, yet there is evidence which supports it. The testimony of Mrs. Atwater with reference to the gift, corroborated to some extent by Mrs. Roach, substantially justifies the finding of the trial court in the respect indicated."

In this connection attention is called to Rule 52 (a) of the new Federal Rules of Civil Procedure entitled, "Findings by the Court," which rule is in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 23 of the Act of Congress approved May 29, 1928 (45 Stat. 795), known as the Revenue Act of 1928, provides in part as follows:

> "SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> "In computing net income there shall be allowed as deductions:
>
> * * * * * * *
>
> (k) DEPRECIATION. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *"

The provisions of the above quoted section of the Revenue Act of 1928 when applied to the Findings of Fact set forth under the preceding heading of this brief, clearly support the following Conclusions of Law made by the learned Trial Judge:

> "6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal

year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company" (R. 428).

"7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company" (R. 429).

"8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928" (R. 429).

"9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000" (R. 429).

His Honor, Judge Biggs, in the Circuit Court of Appeals in the instant case said, *inter alia:*

"To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its

records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view."

It is submitted that the above holding of Judge Biggs is contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge, and since there is ample evidence to sustain the findings of the Trial Judge and his findings in turn support his Conclusions of Law, it was clearly error for the Circuit Court of Appeals to reverse the judgment based upon these findings and conclusions. It is therefore submitted that this Honorable Court should exercise its power of supervision and reverse the judgment of the Circuit Court of Appeals.

4. The Petitioner is Clearly Entitled to a Deduction Because of the Abandonment of a Capital Asset.

On pages 8 and 9 of his opinion, Judge Biggs states:

> "In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee."
>
> * * * * * * * *
>
> "It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of the taxpayer's claim and to afford him an opportunity of correcting errors made by his office.

On this point Mr. Justice Stone in his opinion in *Tucker v. Alexander*, 275 U. S. 228, states (page 231):

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial."

In *Wunderle* v. *McCaughn*, 38 Fed. (2d) 258, Judge Kirkpatrick in his opinion states (page 260):

> "The requirement of the statute (26 U. S. C. A. sec. 156) is 'a claim for refund or credit * * * according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *' The regulations in force require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.' In Tucker *v.* Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' In the opinion of the lower court in the same case (reversed upon the question of waiver, but not disapproved upon the point here involved) it was pointed out that the principal purpose of the condition was to afford the Commissioner an opportunity to correct errors made by his office."

In the case at bar we respectfully refer the Court to the communication from the Deputy Commissioner of Internal Revenue dated February 11, 1931, advising petitioner that its claim for refund would be rejected, in which communication the Deputy Commissioner states (Record, pages 19 and 20):

"Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned;"* (Italics ours).

The above quotation clearly shows that the question of *abandonment* was submitted to the Commissioner of Internal Revenue by your petitioner in support of its claim.

In *Warner* v. *Walsh*, 24 Fed. (2d) 449, the claim for refund was filed on the theory that the amount received by the taxpayer from the estate of her deceased husband was a bequest or a legacy, and therefore not subject to income tax. The court held the income not subject to tax on the theory that the widow by giving up her statutory rights in the estate was purchasing an annuity. The question was raised that this theory had not been advanced in the claim for refund, and on this point Judge Thomas in his opinion states (p. 450):

"The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable. In Union & New Haven Trust Co. *v.* Eaton, Collector, 20 F. (2d) 419, decided by this court on June 2, 1927, it was held that a plaintiff, suing for a refund, is not barred from setting up a ground for relief which was not specified in his claim for refund. There this court said: 'To hold, therefore, that a plaintiff is precluded from asserting a reason * * * not advanced in his notice of claim, is to read a condition into the statute not legislated by Congress.'

"Assuming, however, that the facts upon which a claim for refund is predicated must be incorporated in the notice of claim, and assuming that the plaintiff is precluded from setting up any further facts in her

complaint, I cannot find that the notice of claim filed in the case at bar is deficient. The Commissioner is therein apprized of all of the material facts. It is true that the *theory* of the relief is not set out. But the theory of a claim for relief is something separate and apart from the facts, and the same set of facts may, and often does, give rise to differing theories. To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."

In *Warner* v. *Walsh*, 27 Fed. (2d) 952, on this same point Judge Burrows in his opinion states (page 953):

> "The defendant's second claim is that the taxpayer never presented in writing to the Commissioner of Internal Revenue the 'alleged purchase for value theory' as a ground for her claim for refund, and therefore the claim for refund was never properly presented, or considered within the meaning of the statutes, and hence this action will not lie. This claim was made to the court in the previous case of Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and in the case of Union & New Haven Trust Co. *v.* Eaton, Collector (D. C.) 20 F. (2d) 419, and in both cases, Judge Thomas held this claim untenable, and I concur in this view."

In *Wunderle* v. *McCaughn, supra,* Judge Kirkpatrick, of the same court in which the case at bar was tried, said in his opinion at page 260:

> "I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giv-

ing rise to the claim, is a sufficient compliance with the statute, and, further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund."

* * * * * * *

"I am in accord with the view expressed in Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and the opinion of Union & New Haven Trust Co. *v.* Eaton (D. C.) 20 F. (2d) 419, that, where the Commissioner is apprised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. Nor, I think, is it material that the wrong theory is set out. That is particularly true in a case like this in which the claim involves a narrow and sharply defined issue."

In *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459, Judge Kirkpatrick again said (page 460):

"*No copy of the claim for refund is attached to the statement.* The statement of claim does allege that 'plaintiff duly filed with defendant claim for refund in the sum of $11,854.79.' and that the claim was rejected, and at the argument a motion to amend the statement by attaching a copy was made and the amendment allowed. *An inspection of the paper shows that it does not include the claim now made.* However, a copy of the notice of rejection from the Commissioner of Internal Revenue is attached to the statement, which contains the following:

" 'Mortgages, Notes, Cash, and Insurance.	Returned.	Determined.	Adjusted.
Equitable Life Assurance Society policy	$101,000	$101,000	$101,000

"'It is contended by the estate that the ruling of the bureau in including in the decedent's gross estate all of the above insurance is erroneous. A further review has been made by this office in connection with the above protest, careful consideration being given to the brief submitted by the estate on the question involved. The bureau is, however, unable to change its former ruling, arrived at as the result of the conference held in this office, and therefore the determination, as shown in the closing letter, will be adhered to. *Your claim in connection with this question is, therefore, rejected.*'" (Italics ours.)

After quoting from the notice from the Commissioner of Internal Revenue, rejecting taxpayer's claim in the *Union Trust Co.* case as above set forth, Judge Kirkpatrick in his opinion continues (p. 461):

"From this it appears that the matter of the inclusion of the life insurance policy in the decedent's gross estate, which is the basis of this suit, was presented to the Commissioner, and that it was considered and rejected by him. As stated in the opinion in Tucker *v.* Alexander, *supra:* 'The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto.'

"(3) *If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view*

of his letter, he will be held to have done so. I am therefore of the opinion that, so far as this requirement of the statute is concerned, the statement sets out a sufficient cause of action." (Italics ours.)

The situation in the case at bar is analogous to that in the *Union Trust Co.* case, *supra,* in that in the case at bar the letter from the Deputy Commissioner advising that petitioner's claim would be rejected (R. 19-20) clearly shows that the Commissioner considered the question of abandonment.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year."

In its answer the defendant denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the Court should determine that the plant had been abandoned.

Nor was this question raised by the Government at the trial of this case.

It is submitted that the claim for refund is sufficient for the allowance of the deduction claimed by petitioner, either on the theory of obsolescence or abandonment.

If there is a variance between the grounds alleged in the claim for refund and the grounds alleged in the petition filed in the District Court, which we do not admit, the Government can waive any right it may have to raise this question, and it is submitted that by not raising it either in its answer or in the District Court, the Government has waived this right.

In *Tucker* v. *Alexander*, 275 U. S. 228, the taxpayer was the owner of shares of stock in a corporation which was dissolved and liquidated during the year 1920. A distribution of some portion of the corporation's assets had been made to stockholders in May of 1913. On the dissolution the Commissioner of Internal Revenue taxed as income the difference between the value of the property received by taxpayer as a liquidating dividend, and the value of his stock on March 1, 1913 less the value of the distribution made in May of 1913, which distribution was treated as a return of capital.

Taxpayer paid the tax under protest, and filed a claim for refund assigning as reasons for his claim, (1) the Commissioner's erroneous computation of the March 1, 1913 value of the stock, and (2) the Commissioner's failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders.

There was no explicit statement made in the claim for refund that the Commissioner had erred in decreasing the March 1, 1913 value by the value of the property distributed in May, 1913, nor was that point raised by the petition filed in the District Court, which in effect merely repeated the allegations of the claim for refund.

In the course of the trial taxpayer, without objection by the Government, abandoned the grounds of recovery stated in the petition and attacked only the action of the Commissioner in deducting from the March 1, 1913 value, the value of the distribution made in May of 1913. This was apparently a question as to whether the distribution of May, 1913, was a return of capital, or the distribution of a dividend. That issue alone was litigated. At the close of the trial counsel stipulated that if the court found the deduction to have been erroneously made, the taxpayer should have judgment in a sum named. The judgment entered against taxpayer in the District Court

was affirmed by the Court of Appeals for the Eighth Circuit (15 Fed. (2d) 356) *in an opinion holding that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes, as amended.*

Mr. Justice Stone, of the Supreme Court of the United States, *in reversing the judgment and holding that the taxpayer was not precluded from recovering* in that case, said (pages 230, 231):

> "In our view of the case, the question considered by the circuit court of appeals was not properly before it, and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.
>
> "If the Collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed, it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.
>
> "Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair*, 116 U. S. 200; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 353, 354; *Nichols* v. *United States*, 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here

may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

See also *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459.

There is no question but that petitioner herein sustained a substantial loss in that during the taxable year in question a title plant owned by petitioner lost a very large part of its value, and it would seem therefore that the petitioner is entitled to a deduction for this loss whether it be considered that the loss was sustained through obsolescence or abandonment. In either event it is a loss in connection with a title plant.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of *certiorari* should be granted as prayed for.

MAURICE BOWER SAUL,
Counsel for Petitioner.

JOSEPH A. LAMORELLE,
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Of Counsel.

JULY 24, 1939.

APPENDIX.

STATUTES INVOLVED.

The law applicable to this case is the Act of Congress approved May 29, 1928 (45 Stat. 795) known as the Revenue Act of 1928. The pertinent provisions of this statute are as follows:

"**Section 1. Application of Title**

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years.

§ 48. Definitions

When used in this title—

(a) Taxable Year. 'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928.

(b) Fiscal Year. 'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

§ 23. Deductions from Gross Income

In computing net income there shall be allowed as deductions:

* * * * * * *

(f) Losses by Corporations. In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(g) Basis for Determining Loss. The basis for

determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.

* * * * * * *

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * * * *

(m) Basis for Depreciation and Depletion. The basis upon which depletion, exhaustion, wear and tear and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

§ 114. Basis for Depreciation and Depletion

(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.

§ 113. Basis for Determining Gain or Loss

(a) Property Acquired After February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to corporation where control of property remains in same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same

persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * * *

(b) Property Acquired before March 1, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913 shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided, or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

§ 112. Recognition of Gain or Loss

(b) (4) Same—Gain of corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

* * * * * * *

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. **No. 229.**

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF ON BEHALF OF PETITIONER SUR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1939.

MAURICE BOWER SAUL,
JOSEPH NEFF EWING,
Counsel for Petitioner.

JOSEPH A. LAMORELLE,
MURRAY FORST THOMPSON,
Of Counsel.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

October Term, 1939. No. 229.

The Real Estate-Land Title and Trust Company,
Petitioner,

v.

United States of America,
Respondent.

BRIEF ON BEHALF OF PETITIONER
SUR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1939.

OPINIONS OF THE COURTS BELOW.

The Opinion of the Circuit Court of Appeals is reported in 102 Fed. (2d) 582. It will be found on pages 319-327 of the Record. The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge in the District Court will be found on pages 287 to 306 inclusive of the Record.

JURISDICTION.

1. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. Section 347.

2. The judgment of the Circuit Court of Appeals was entered on March 13, 1939 (R. 327). Petition for rehearing was filed April 11, 1939, within the time provided by the Rules of the Circuit Court of Appeals for the Third Circuit, and the petition for rehearing was denied on May 1, 1939 (R. 328).

On July 26, 1939, taxpayer filed with your Honorable Court a petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted by your Honorable Court on October 9, 1939.

STATEMENT OF QUESTIONS PRESENTED.

1. Whether or not taxpayer is entitled to a deduction for obsolescence of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

2. Whether or not it was proper for the Circuit Court of Appeals in this case to direct the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge.

3. Whether under the claim for refund filed in this case taxpayer is entitled to a deduction on account of the abandonment of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

STATUTES INVOLVED.

The relevant provisions of the Revenue Act of 1928 (45 Stat. 795) are set forth in the Appendix hereto at pages 49 to 51 inclusive.

STATEMENT OF THE CASE.

The taxpayer herein is a corporation created by the merger of three other corporations, namely, the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company, all of which formerly carried on business in the City of Philadelphia (R. 245). The merger of these three companies became effective October 31, 1927, and the new corporation opened for business the following day (R. 245). Negotiations for the said merger were first entered into by the Real Estate Title Insurance and Trust Company and the West End Trust Company, which companies agreed on a two-company merger. The Land Title and Trust Company was not considered as a party to the merger until the latter part of September, 1927, about two weeks before the merger agreement was signed (R. 30, 31).

Before the above-mentioned merger two of the companies, viz., the Real Estate Title Insurance and Trust Company, and the Land Title and Trust Company, each owned a title plant used in its respective business of insuring titles to real estate. Both of these title plants were acquired by taxpayer at the time of the merger (R. 31). When the merger agreement was signed there was no definite plan for the use or disposition of the two title plants (R. 32). The Land Title and Trust Company came into the merger negotiations at such a late date that there was not time to give much consideration to the practical operation of the two plants, or to what disposition should be made of either or both of them (R. 32). It was the idea of the President of the new company that the plant of the Land Title and Trust Company should be used by the new company in carrying on its title business (R. 32). It was not until the negotiations for the merger had been completed, and the agreement signed by all three companies, that the question arose as to what would be done with the two title plants (R. 32).

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An officer of The Land Title and Trust Company and an officer of the Real Estate Title Insurance and Trust Company were appointed to examine into the situation (R. 31). After their report was submitted it was decided that the new corporation (taxpayer herein) should commence operations using the title plant of the Real Estate Title Insurance and Trust Company, and that the title plant of the Land Title and Trust Company should be stored and held in reserve (R. 32 and 296). It was not considered economical to keep both title plants up-to-date by daily additions thereto, until it was determined that both title plants would be needed in the business of the new corporation (R. 32, 33).

The title plant of the Land Title and Trust Company was used in connection with Sheriff's sales occurring the first Monday of November, 1927, and other information was obtained from this plant and used by the taxpayer for several weeks thereafter (R. 32-34). Within a couple of months after the merger it was definitely determined that the title plant formerly owned by the Real Estate Title Insurance and Trust Company would be sufficient for the purposes of taxpayer's business, and at that time there was a virtual abandonment of the title plant formerly owned by the Land Title and Trust Company (R. 32, 33).

The abandoned plant was in the market for sale and would have been sold had a reasonable offer been received. A price of $1,000,000 was quoted on it, but no offer in any amount was received (R. 33). No additions were made to this plant at any time after the merger, and as time went on the plant became more and more out of date due to the fact that it was not being kept up by daily additions thereto. During the first year after the merger it would have been necessary to enter in the records of this title plant, a record or notation of 227,498 documents to keep it up-to-date (R. 105). The dismantled

title plant was stored in the basement of premises 517 Chestnut Street, where it was still housed at the time of the trial of this case (R. 32 and 34).

Taxpayer brought suit against the United States in the District Court of the United States for the Eastern District of Pennsylvania, wherein taxpayer claimed that in determining its net income subject to tax for the fiscal year ending October 31, 1928, it was entitled to a deduction in the amount of $1,250,000 due to the fact that the title insurance plant then owned by taxpayer, but formerly owned by the Land Title and Trust Company, became obsolete and was abandoned during the said year, and claimed a refund of income tax for the said year in the amount of $153,125. This suit was started after taxpayer's claim for refund had been disallowed by the Commissioner of Internal Revenue. The case was tried in the District Court on February 2nd and 3rd, 1937, by a Judge without a jury.

Taxpayer produced testimony at the trial showing that the title plant formerly owned by The Land Title and Trust Company was not worth over $125,000 on October 31, 1928, a year after the merger, and that it had been worth a minimum of $1,000,000 on March 1, 1913 (R. 75, 76, 102, 297). No depreciation or obsolescence had ever been allowed upon the said title plant from March 1, 1913 up to the date of the merger (R. 247).

The Trial Judge found that this title plant was the subject of obsolescence during taxpayer's fiscal year ending October 31, 1928, that it became obsolete on or before October 31, 1928, that taxpayer had sustained a loss during its fiscal year commencing November 1, 1927 and ending October 31, 1928 in the amount of $875,000 representing the difference between the fair market value of this title plant on March 1, 1913, and its value on October 31, 1928 (R. 297, 298), and concluded that the taxpayer was entitled to deduct this amount in determining its net taxable income for the fiscal year ending October 31, 1928 (R. 301).

Judgment was entered in the District Court in favor of taxpayer and against the United States on March 31, 1937, in the amount of $107,270.71 with interest, representing the amount of the overpayment of income tax by taxpayer for the year in question, and from this judgment the United States appealed to the Circuit Court of Appeals for the Third Circuit (R. 306 and 307).

The case was argued in the Circuit Court of Appeals on January 11, 1938, before Hon. J. Warren Davis and Hon. John Biggs, Jr., Circuit Judges, and Hon. Albert L. Watson, District Judge, and fourteen months later, to wit, on March 13, 1939, an opinion was filed by the Hon. John Biggs, Jr., reversing the judgment of the District Court. On the 11th day of April, 1939, a petition for rehearing was filed in the Circuit Court of Appeals, which petition was denied on May 1, 1939.

On July 26, 1939, taxpayer filed with your Honorable Court a petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted on October 9, 1939.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the title plant of the Land Title and Trust Company could be operated effectively with approximately one-third the number of employees required to operate the plant formerly owned by the Real Estate Title Insurance and Trust Company.

2. The Circuit Court of Appeals erred in holding that there is no evidence to show that the title plant of the Land Title and Trust Company was used in connection with new searches of properties after October 31, 1927.

3. The Circuit Court of Appeals erred in holding that "the basis offered for obsolescence is really that of the duplication of property."

4. The Circuit Court of Appeals erred in holding that the loss claimed by the taxpayer cannot be brought within any established definition of obsolescence.

5. The Circuit Court of Appeals erred in holding that it is contrary to the facts to hold that the title plant formerly owned by the Land Title and Trust Company became obsolete within the taxable year.

6. The Circuit Court of Appeals erred in disregarding the findings of the District Court and in holding that it is contrary to reason to conclude that a title plant created between the years 1886 and 1887 and steadily added to and kept up-to-date until October 1927, loses its usefulness in the following twelve months because of the failure to add current notations to its records, and that there is no adequate evidence of record in the case at bar to sustain such a view.

7. The Circuit Court of Appeals erred in holding that the deterioration suffered by the title plant in the period from November 1, 1927 to October 31, 1928, was physical deterioration and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Company *v.* United States, 284 U. S. 511.

8. The Circuit Court of Appeals erred in holding that obsolescence cannot be maintained upon the basis claimed in the case at bar.

9. The Circuit Court of Appeals erred in holding that the taxpayer is not entitled to the deduction claimed in this proceeding on the theory of abandonment because the claim for refund by taxpayer "was asserted by it solely upon the ground of obsolescence."

10. The Circuit Court of Appeals erred in holding that the amount of deduction allowed to the taxpayer by the District Court was not supported by the evidence.

11. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

12. The Circuit Court of Appeals erred in directing the entry of a judgment for the respondent.

13. The Circuit Court of Appeals erred in entering the following judgment:

"The judgment of the court below is reversed and the cause is remanded with the direction to enter judgment in favor of the defendant-appellant."

SUMMARY OF ARGUMENT.

We shall discuss the legal questions involved in this case under the following headings:

1. Taxpayer is entitled to a deduction for the fiscal year ending October 31, 1928 in the amount of the loss sustained by it due to the obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company.

2. The loss sustained by taxpayer through obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company is the difference between the fair market value of the said title plant on March 1, 1913, and the value thereof on October 31, 1928.

3. There is ample evidence to sustain the Findings of Fact of the Trial Judge.

4. The Circuit Court of Appeals erred in directing the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the Trial Judge, in that his Findings of Fact are conclusive and fully sustain his Conclusions of Law.

5. On the record in this case taxpayer is clearly entitled to a deduction on the theory of abandonment as well as on the theory of obsolescence.

ARGUMENT.

1. Taxpayer is entitled to a deduction for the fiscal year ending October 31, 1928 in the amount of the loss sustained by it due to the obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company.

There is no doubt that the taxpayer in this case has sustained a real loss. Upon the formation of the merged company under the name of The Real Estate-Land Title and Trust Company, it found itself with two complete title plants, one formerly operated by the Real Estate Title Insurance and Trust Company, and the other by the Land Title and Trust Company. It was not known at the time the merger agreement was entered into what disposition would be made of these plants (R. 32). As pointed out by Mr. J. Willison Smith, President of the corporation, in his testimony, the merger had first been agreed upon by the West End Trust Company and the Real Estate Title Insurance and Trust Company (R. 30, 31). The West End Trust Company had no title plant so the merger as originally planned included but one such plant (R. 31). When the Land Title and Trust Company came into the picture about two weeks before the merger agreement was signed, an entirely new situation was presented. It was then for the first time that the two title plants came upon the scene together. Mr. Smith testified that there was not time to give this matter any serious consideration before the agreement was signed. After the negotiations had been completed and the agreement signed by the Directors of all three Companies, the question naturally arose as to what would be done with the two title plants. Mr. Smith testified that the matter was referred to Mr. Bonsall, then Vice President of the Land Title and Trust Company, under whose supervision the Title Department operated, and Mr. Cowdrick, then Vice President of the Real Estate Title Insurance

and Trust Company, who had supervision of the title work of that organization. Mr. Mecutchen, Title Officer of the taxpayer, was at that time in the Title Department of the Land Title and Trust Company under Mr. Bonsall. He testified that he had gone with Mr. Bonsall and Mr. Cowdrick to examine the plant of the Real Estate Title Insurance and Trust Company and that they had arrived at the conclusion that they would commence operations with the title plant of that company (R. 50). This was after the merger agreement was entered into and only shortly before the merger became effective. The reason for the decision to continue the use of the title plant of the Real Estate Title Insurance and Trust Company instead of the Land Title and Trust Company was that the operation of the former required only 43 employees while the operation of the latter required 124 (R. 51).

It is to be noted that at the time the merger agreement was entered into and thereafter until the examination of the plant of the Real Estate Title Insurance and Trust Company by Mr. Bonsall, Mr. Mecutchen and Mr. Cowdrick, there was no plan for, nor had the officers of the new corporation given serious consideration to, the disposition of the two title plants (R. 32). Mr. Smith testified that he originally thought the Land Title and Trust Company plant the better of the two and that this one would be used, but that he had in mind they might be able to work them advantageously together. It is clear that the plant of the Land Title and Trust Company was not acquired by the new corporation with the intent of eliminating competition. We emphasize this particularly.

When it was later ascertained that the two plants would not be necessary and that the Real Estate Title Insurance and Trust Company plant could do the work alone and be operated more economically than the Land Title and Trust Company plant, the logical conclusion was to abandon the

latter. Needless to say it would have been bad business to incur the expense of keeping both plants up to date. The Land Title and Trust Company plant had been taken down and stored the latter part of October and early part of November, 1927, in the basement of premises No. 517 Chestnut Street (R. 32). It was still there in reserve, so to speak, and could have been taken out and used in conjunction with or in lieu of the Real Estate Title Insurance and Trust Company plant if it appeared advantageous to do so.

Mr. Smith testified that some time after the merged corporation had started using the plant of the Real Estate Title Insurance and Trust Company in its operations it was definitely determined that it would be satisfactory and that there would be no further need for the old Land Title and Trust Company plant (R. 32). At that time there became a virtual abandonment of the Land Title and Trust Company plant so far as its use by the new corporation was concerned. It was then in the market for sale and Mr. Smith testified that it would have been sold had a reasonable offer been received. He discussed its possible sale with Mr. Barker, then President of the Bankers Trust Company, and quoted a price of $1,000,000 (R. 33). Negotiations were carried on with regard to this sale but eventually were abandoned by Mr. Barker without his having made any offer. Mr. Smith was asked if anyone had made him an offer for the purchase of the plant in any amount and he replied in the negative (R. 33). Of course the plant was running down all this time. During the first year after the merger 227,498 documents should have been entered in the records of the plant to keep it up to date (R. 105). As was testified by Mr. Mecutchen, no entries whatever were made (R. 105). It is clear from this that obsolescence set in after the plant was stored in the basement at No. 517 Chestnut Street and the plant was deteriorating in value during the

entire year. On October 31, 1928, which was the end of taxpayer's fiscal year, the expense of putting this plant in shape for use would have been practically prohibitive (R. 78).

The Revenue Act of 1928, which applies to this case, provides in Section 23 for "Deductions from Gross Income," including in paragraph (*f*) "losses sustained during the taxable year and not compensated for by insurance or otherwise" and in paragraph (*k*) "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The taxpayer's loss can be properly placed in either one of these classes. It certainly was "sustained during the taxable year and not compensated for by insurance or otherwise" and it was equally due to "obsolescence" of the title plant of the Land Title and Trust Company.

That the plaintiff suffered a "loss" in the sense that the word is used in the Revenue Act of 1928 is clearly apparent from the decision of the Board of Tax Appeals in the case of *Fox River Paper Co.* v. *Commissioner of Internal Revenue,* 28 U. S. Board of Tax Appeals Reports 1184 (1933). There were two questions in that case dependent upon different sets of facts. One part of the case is almost identical with the case at bar. The petitioner purchased machinery and equipment, and in the same year as the purchase found that it was unsuitable for its purposes and accordingly abandoned it and claimed credit for the cost price in determining its net income for tax purposes. The Board of Tax Appeals there held that this constituted an abandonment which came within the terms of an identical provision of the Revenue Act of 1918, saying at page 1200:

> "The Board has held, in *Reuben H. Donnelley Corp.,* 26 B.T.A. 107; *I. G. Zumwalt,* 25 B.T.A. 566; *Belridge Oil Co.,* 11 B.T.A. 127, that whether or not

there has been an abandonment depends on the intention of the owner, coupled with the act of abandonment, both to be ascertained and determined from all the facts and surrounding circumstances.

All of the property was purchased by the petitioner with the intention of using it in the operation of its business, with certain changes to make it suitable for the manufacture of paper from rags. After the execution of the agreement in 1920, the petitioner discovered that certain of the machinery and equipment was not in condition for its use and not suited for its purpose.

* * * * * * *

"It is our conclusion that the petitioner did sustain a loss in the amount of $103,524.92 in 1920 and that such loss is deductible under section 234 (a) (4) of the Revenue Act of 1918. *Parma Co.*, 18 B.T.A. 429; *Winter Garden, Inc.*, 10 B.T.A. 71; *Peoples Ice & Cold Storage Co.*, 10 B.T.A. 16; *Union Bed & Spring Co.* v. *Commissioner*, 39 Fed. (2d) 383; *Wheeling Tile Co.* v. *Commissioner*, 25 Fed. (2d) 455."

A comparatively recent case very much in point is *Sanitary Co. of America* v. *Commissioner of Internal Revenue*, 34 Fed. (2nd) 439, (C. C. A. 3rd, 1929), in which the opinion was written by his Honor, Judge Buffington, who held that a loss was properly taken even though it had been incurred by buying the plant of a competitor and scrapping it to prevent competition. He there said (page 440):

"What followed was quite in the line of ordinary business. The Sanitary Company scrapped the plant, and incurred the loss which almost inevitably follows when a going plant is scrapped. It sold at the scrap prices of the inventory $15,876.57, and removed to other plants such articles, to the amount of $21,104.48,

as it could use, and, after deducting freight and other expenses, placed its loss at $10,699.54. We find this course, carried out on the principles and practices usually incident to business, was a just and proper mode of ascertaining its loss. The refusal of the taxing authorities to allow for this loss was in our judgment reversible error. In arriving at such conclusion we note the case of Sample *v.* Commissioner (C. C. A.) 23 F. (2d) 671, is in accord therewith."

From the evidence in the case at bar it is clear that the title plant formerly owned by the Land Title and Trust Company was not kept up-to-date by daily additions thereto after October 31, 1927, the last day of the taxable year preceding the taxable year involved in this case. Judge Biggs, of the Circuit Court of Appeals, in his opinion states:

> "Moreover, we think that in a true sense the deterioration suffered by the plant in the period from November 1, 1927, to October 31, 1928, was physical deterioration, and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Co. *v.* United States, *supra.* The loss suffered by the appellee within the taxable year is more closely allied to depreciation, which, continued from year to year thereafter, might result upon some future date in a complete loss of value in the plant" (R. 325).

From the above holding it is clear that Judge Biggs was of the opinion that deterioration was suffered by the title plant during the period November 1, 1927 to October 31, 1928, but that such deterioration may not be claimed as obsolescence. Judge Biggs admitted that there was a loss suffered by the taxpayer within the taxable year, but said that this loss was "more closely allied to depreciation."

The taxpayer claimed a loss due to "obsolescence", and the Trial Judge found that the said title plant was the subject of "obsolescence" during the fiscal year ending October 31, 1928, and became "obsolete" on or before that date. It is submitted that Judge Biggs of the Circuit Court of Appeals, was in error in holding that this loss was "more closely allied to depreciation"; as depreciation results from ordinary wear and tear, while the loss in this case resulted *not* from ordinary wear and tear, but from the failure to keep the said title plant up-to-date by daily additions thereto, and from the abandonment thereof.

In the case of *Crooks, Collector,* v. *Kansas City Title and Trust Company,* 46 Fed. (2nd) 928 (C. C. A. 8th, 1931), it was held that abstract plants acquired by the taxpayer and not kept up-to-date because found upon trial to be inefficient, were the proper subjects of obsolescence.

In the opinion of Judge Kenyon in the *Crooks* case we find the following (page 929):

> "The real complaint of appellant is that notwithstanding complete obsolescence in 1930 was determined in 1920, under this record the amount to be set aside for such obsolescence is impossible of determination and that the court's allowance is wrong. As a jury was waived in writing we are limited to the questions as to whether there was substantial evidence to sustain the findings of fact and whether they support the judgment.
>
> * * * * * * *
>
> "The deduction under the law is a reasonable allowance for exhaustion, wear and tear of property used in the business, including a reasonable allowance for obsolescence. Revenue Act 1921, c. 136, sec. 234(a), 42 Stat. 227, 256."

"The Treasury Department through the Bureau of Internal Revenue has laid down the rule as to obsolescence of abstract plants under section 234(a), c. 136, 42 Stat. 227, 256, in a ruling as follows:

"'The cost of an abstract plant, found upon trial to be inefficient and to which additions were not made in order to keep it up-to-date, may be recovered through depreciation or obsolescence allowances.'

"The opinion as set forth in I. T. 1775 Internal Revenue Cumulative Bulletin is as follows:

"'In 1921 the taxpayer purchased the abstract plant of the M. Company. At the time this plant was purchased it was thought it could be used to advantage in the abstract and title guaranty work of the taxpayer but was found upon trial to be inefficient and the records in part a duplication of the records of the taxpayer. It was then decided not to continue additions thereto from day to day in order to keep it up-to-date.

"'Advice is requested as to whether the taxpayer may take as a deduction depreciation sustained to the plant in view of the fact that it has not been added to or kept up-to-date since its purchase.

"'Held, that it is a proper case for depreciation or obsolescence allowances and the cost of the plant less the salvage value thereof should be spread equally over the period from the date the permanent abandonment of the plant was foreseen to the date of the permanent abandonment and deductions allowed each year in such amounts for income tax purposes.'

• • • • • • •

"There was substantial evidence to sustain the findings of fact by the court, and the conclusions of law are amply supported by such findings.

"The judgment is affirmed."

While in the *Crooks* case obsolescence was held to have extended over a period of years, this was due to the fact that obsolescence was foreseen in that case. In the case at bar, however, had there been no merger, there would have been no question of obsolescence, so it could not have been foreseen prior to that time. The point we emphasize is that in the *Crooks* case the court recognized that an abstract plant was a proper subject of obsolescence, and in doing so relied on a ruling by the Treasury Department.

The most common definition of the word "obsolete" is "out of use." There is no doubt of the fact that the title plant of the Land Title and Trust Company was definitely "out of use" on October 31, 1928. It had become obsolete for a number of different reasons including (1) discontinuance of posting, (2) storage in the basement of 517 Chestnut Street, and last, but not least, (3) its abandonment by the taxpayer.

Burnet v. *Niagara Falls Brewing Co., et al.*, 282 U. S. 648 (1931), was an appeal to the Supreme Court of the United States from the decision of the Circuit Court of Appeals for the Second Circuit allowing a claim for obsolescence of the property of a brewing company on account of the passage of the Prohibition Amendment. Mr. Justice Butler, in a very interesting opinion, went into the meaning of the word "obsolescence" in a case of this character and concluded that obsolescence had been reasonably established by the plaintiff. He emphasized the rule that "tax laws are to be liberally construed in favor of taxpayers" and cited a number of United States Supreme Court decisions to this effect. We quote the following from his opinion (p. 653):

"The Government argues that obsolescence is the state of becoming obsolete, that property is obsolete when it is no longer useful for the purpose for which it was acquired and can not be used for any other purpose and that obsolescence begins only when there is a reasonable certainty that the property will become obsolete. And further, that there is no finding that at any time during the taxable years in question it became apparent that the property would become obsolete and that no inference to that effect can properly be drawn from the facts found.

"In the solution of the problem here presented, no general or comprehensive definition of 'obsolescence' is necessary. The word is much used and its meaning depends upon and varies with the connections in which it is employed. *It has been said to be 'the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions.'* Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. *Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes.*

"We are here concerned with the meaning of obsolescence as used in the above quoted clause of the taxing Act. *Clearly the statute contemplates that, where warranted by the facts, the taxpayer shall have the benefit of, and in making his return may deduct in each year, a reasonable allowance to cover obsolescence of the tangible property. And that is in accord with sound principles of accounting. Cf. Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 451. *Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403, 415. The provision is general and applied alike to all taxpayers; its purpose is to guide the ascertainment of taxable

income in each year. *It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers.* *Farmers Loan & T. Co.* v. *Minnesota*, 280 U. S. 204, 212. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350. *United States* v.. *Merriam*, 263 U. S. 179, 188. *Shwab* v. *Doyle*, 258 U. S. 529, 536. *Eidman* v. *Martinez*, 184 U. S. 578, 583.

"*It would be unreasonable and violate that canon of construction to put upon the taxpayer the burden of proving to a reasonable certainty the existence and amount of obsolescence. Such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient. Neither the cost of obsolescence nor of accruing exhaustion, wear and tear that is properly chargeable in any period of time can be measured accurately. A reasonable approximation of the amount that fairly may be included in the accounts of any year is all that is required.* In determining the proper deduction for obsolescence there is to be taken into consideration the amount probably recoverable, at the end of its service, by putting the property to another use or by selling it as scrap or otherwise. There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolescence." (Italics ours.)

This case was followed in *United States* v. *Wagner Electric Mfg. Co.*, 61 Fed. (2nd) 204, (C. C. A. 8th, 1932), in an opinion by Judge Sanborn, wherein he quoted from the *Niagara Falls Brewing Co.* case and then said (page 207):

"All that the court, in this case, was required to do, then, was to make a reasonable approximation of the portion of the admitted loss from obsolescence which

took place in the year 1918, when the event transpired which caused the entire loss."

The Wagner Electric Company had been making shells first for the British and later for the United States for use in the World War. After the signing of the Armistice it received notice to suspend further operations of this character. A claim for obsolescence on the plant and machinery especially adapted for shell-making followed. Referring to the case of *United States Cartridge Co.* v. *United States*, 284 U. S. 511 (1932), Judge Sanborn said (page 206):

> "The court pointed out that "'obsolescence' may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws, and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value," and then said (page 517 of 284 U. S., 52 S. Ct. 243, 245): "Under the circumstances disclosed by the findings, the buildings erected by petitioner are not to be distinguished from equipment designed, constructed and suitable only for the performance of a single job or from brewery plants put out of use by prohibitory laws."

It is interesting to note that Judge Sanborn did not think it material whether obsolescence for all the machinery and equipment used in the manufacture of shells was taken in the year 1918 when the Armistice was declared, or partly in 1918 and partly in the year following. All that he considered necessary was "a reasonable approximation."

Judge Sanborn did, however, point out very clearly that since the event which caused obsolescence to set in, namely the signing of the Armistice on November 11th, occurred during the year 1918, the full amount of loss due

to obsolescence might be taken in that year. In his opinion Judge Sanborn stated (p. 206):

> "The end of the war on November 11, 1918, marked the end of the usefulness of special plants and machinery for the making of munitions to be used in the prosecution of the war. The value of such plants and machinery due to the continuation of hostilities disappeared when the hostilities ceased, and there remained then only such value as the property might have for other uses or for salvage. As the loss from obsolescence to this taxpayer was admitted, there remained to be determined only the question as to what proportion of such loss could properly be attributed to the year 1918. *Since the event which caused the loss occurred in 1918, it would appear that the entire loss might not unreasonably have been attributed to that year.* The fact that the taxpayer could still use a portion of the machinery for one month in 1919 to finish shells in process of manufacture was a matter to be considered in determining its income for 1918, but obviously it did not postpone the effect of the Armistice upon the value of the taxpayer's tangible property or prevent the depreciation of that property resulting from that event. Being valuable only in time of war, the property took the full depreciation due to the cessation of war at once. We think that in this case it is not important what value the taxpayer's property had for use in finishing work in process, since the full amount of loss due to obsolescence is not in dispute and since the use was merely incidental to the winding up of the taxpayer's business of manufacturing munitions. The Board of Tax Appeals apparently reached a similar conclusion in Plymouth Brewing & Malting Co. *v.* Commissioner, 16 B. T. A. 123, and in J. Chr. G. Hupfel Co., Inc., *v.* Commissioner, 9 B. T. A. 944." (Italics ours.)

It is apparent from the above case that obsolescence is not a process which must go on over a period of years, but that on the contrary, a tangible asset may become obsolete over night.

2. The loss sustained by taxpayer through obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company, is the difference between the fair market value of the said title plant on March 1, 1913, and the value thereof on October 31, 1928.

Section 114 (a) of the Revenue Act of 1928 expressly sets forth the basis upon which obsolescence is to be allowed and is as follows:

> "SEC. 114. **Basis for Depreciation and Depletion (a) Basis for Depreciation.** The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property."

Section 113 of the Revenue Act of 1928 referred to in the above quoted section is in part as follows:

> "§113. **Basis for Determining Gain or Loss (a) Property Acquired After February 28, 1913.** The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * * * *
>
> (7) **Transfers to corporation where control of property remains in same persons.** If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such prop-

> erty of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

The stipulation in the case at bar sets forth that all of the stock of the new corporation, *i. e.*, The Real Estate-Land Title and Trust Company, was issued to the stockholders of the three corporations forming the merger in consideration for the assets of these corporations acquired by the new company. The said stipulation also sets forth that the said merger was a transaction in which no gain or loss to any of the merging companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act properly applicable thereto (R. 245-247). Therefore under the provisions of Section 113 (a) (7) of the Revenue Act of 1928 quoted above, the basis upon which obsolescence is to be allowed to the taxpayer herein in connection with the said title plant formerly owned by the Land Title and Trust Company is the "same as it would be in the hands of the transferor", which transferor was the said Land Title and Trust Company.

The recent case of *Fairbanks Court Wholesale Grocery Co. v. Commissioner of Internal Revenue*, 84 Fed. (2nd) 18, (C. C. A. 7th, 1936; *certiorari* denied 299 U. S. 582), decides on facts similar to those in the case at bar that the basis on which obsolescence is allowable to the new corporation is the same as the basis in the hands of the merging corporation which previously owned the property. In the present case this basis is the March 1, 1913 value, inasmuch as the said title plant was acquired by the Land Title and Trust Company prior to March 1, 1913, and the taxpayer is therefore permitted by Section 113 (b) of the Revenue Act of 1928 (Appendix to this brief, page 51)

to use the cost of the said title plant or its March 1, 1913 value, whichever is greater.

The Trial Judge found that the title plant in question was acquired by the Land Title and Trust Company during the years 1886 and 1887 at a cost of $251,509.84. He also found that additions to the said plant were made in the years 1888, 1889 and 1890 at a cost of $24,541.78, and that from 1890 to February 28, 1913 at least $317,645.36 was expended in maintaining the said title plant and keeping it up-to-date, which materially increased the value of the said plant (R. 294, 295). The evidence introduced by the taxpayer at the trial of this case showed that the title plant had a value of from $1,000,000 to $1,250,000 on March 1, 1913, and the Trial Judge found that on March 1, 1913 the fair market value of the said title plant was $1,000,000 (R. 297). From the above it is clear that the value of the said title plant on March 1, 1913 was greater than its cost and therefore, under the provisions of Section 113 (b) of the Revenue Act of 1928, the March 1, 1913 value or $1,000,000, is the basis on which obsolescence is allowable in this case.

The taxpayer's fiscal year was November 1 to October 31. The loss occurred between November 1, 1927 and October 31, 1928. The amount of the loss is therefore to be ascertained by deducting the value of the said title plant on October 31, 1928 from its value on March 1, 1913. The testimony of taxpayer's witnesses showed that on October 31, 1928 the value of the said title plant had diminished through obsolescence to an amount not in excess of $125,000 (R. 76, 102). As above stated the Trial Judge found that the fair market value of the title plant on March 1, 1913 was $1,000,000. The Trial Judge also found that on October 31, 1928, the fair market value of this title plant was $125,000, and that the taxpayer had sustained a loss during the taxable year ending October 31, 1928 in the amount of $875,000 representing the difference between these values (R. 298).

3. There is ample evidence to sustain the Findings of Fact of the Trial Judge.

The learned Trial Judge filed, *inter alia*, the following Findings of Fact:

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927 (Finding No. 15, R. 296).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 296).

(*c*) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 296).

(*d*) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 296).

(*e*) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 296).

(*f*) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company,

which had been put in storage, would not be needed (Finding No. 21, R. 296, 297).

In support of the above Findings we respectfully refer to the testimony of J. Willison Smith, President of the taxpayer corporation, wherein the following appears (R. 32, 33, 34):

"Mr. Bonsall was requested to take up the subject and make a report, which he did, in the latter part of October, toward the end of October, 1927. I don't recall definitely who worked with Mr. Bonsall, but I think Mr. Mecutchen, who was the title officer, worked with Mr. Bonsall on that report, and they studied the situation with the Real Estate Title officers (Tr. 21-22). The report was that from the practical standpoint, and an economical standpoint, the Real Estate Title plant should be tested out and determine whether the economy would make it worth while to continue that plant and not use—until that trial period was over—anything in the way of the Land Title plant. The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of the coming month, the month of November, and I think December, although I can't say definitely on that. Economy of operation of the Real Estate Title plant was so convincing that it was definitely determined later that the plant of the Real Estate Title should be the working plant. The plant of the Land Title had been placed in the basement of 517 Chestnut Street, which was the old office of the Real Estate Title Insurance and Trust Company, and now the downtown office of the Land Title Bank and Trust Company.

"We did not keep the Land Title plant up-to-date. It was allowed to run down, as far as keeping it up to the daily records, and judgments and plans and abstracts from the daily records, and so forth (Tr. 23).

"Q. At what time did you start to allow the Land Title plant to go down?

"A. Well, my recollection was about the time of the latter part of October, about that time. But parts of the Land Title plant were used during the early part of November, as I recall it, of 1927, to take care of some situations which were necessary at that particular time of the month.

"Q. In other words, I understood that you testified that they continued to use it, but did they continue to keep up the records in it?

"A. No, they did not.

"Q. From sometime, you say, in the latter part of October?

"A. That is correct" (R. 32, 33).

• • • • • • •

"Q. What was the ultimate disposition of that plant?

"A. It is still there without use, without practically any use.

"Q. When did you cease to use it?

"A. I don't believe that plant has been used—of course I did not actually physically handle the situation, but to the best of my recollection it hasn't been used since 1928, early part of 1928" (R. 34).

The testimony of Mr. Mecutchen is in part as follows (R. 50-52; 57):

"Q. Mr. Smith testified that Mr. Bonsall and Mr. Cowdrick took up the question of which of the two title plants would be used by the new company. Were you associated with Mr. Bonsall in that work?

"A. I went around with him and Mr. Cowdrick. We were shown the various operations that went on in the Real Estate Title plant and the character of its conditions; Mr. Cowdrick asking some questions that were asked by us, particularly by Mr.

Bonsall. And it was after, that it was concluded to try out the Real Estate Title plant as being the preferable one to use from the standpoint of economy and probably also from the standpoint of speed" (R. 50).

* * * * * * *

"Q. Then I understand you came to the conclusion to use the Real Estate Title plant on account of economy of operation?

"A. Yes, sir; that is true.

"Q. And what happened to the Land Title plant?

"A. The Land Title plant was taken down to 517 Chestnut Street, and the larger part of it was stored in the basement, some portions of it were kept elsewhere. I think the block plan books were not stored in the basement, but everything else of any importance, that I know of, was stored down there" (R. 51, 52).

* * * * * * *

"Q. And what happened to them after they were put there? Were they used or not?

"A. The only use made of them in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation, what references may have been made from time to time to that plant (Tr. 66).

"Q. You do know that they looked up some things from time to time?

"A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

"Q. Did they increase or decrease after the plant was stored there?

"A. I think that it decreased as the time went by, so that there was practically little or no use made of it by the end of the year following the merger" (R. 57).

Mr. Mecutchen testified that the number of entries which would have been made in the title plant of the Land Title and Trust Company for the year beginning November 1, 1927 and ending October 31, 1928, had the said title plant been kept up-to-date during that period, would have totaled 227,498 as follows (R. 105):

"From November 1st, 1927 to October 31, 1928, inclusive, there were 54,419 mortgages; 62,710 deeds, 19,963 assignments; 2,031 releases; 38,207 judgments; 47,075 liens, including more particularly mechanics and municipal claims; and United States District Court judgments, 1,944; and bankruptcies, 1,149."

The learned Trial Judge also found as follows:

(*g*) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 297).

The above finding is supported by the following testimony of Henry R. Robins, President of the Commonwealth Title Company of Philadelphia (R. 77, 78 and 96):

"Q. Let me ask you to say what the difference was in the plant after it had been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928? (Tr. 105.)

"The Witness:—It would have a continuous depreciation from October 31, 1927, down to 1928; that depreciation rapidly increasing as time went on. In the early part of 1928 the depreciation of the value of that plant would not be so great as at the end of the year, and as you got near the end of the year it would go down at a greater rate. So it would be pretty nearly valueless at the end of the year, for the expense of bringing it up to date would have been so great that no one would have thought—no sane man in business would have thought of buying that plant and going to the expense of bringing it up to date.

"By Mr. Ewing:

"Q. That is a year after it had been stored?

"A. A year after it had been stored. In the early part of the year the expense of bringing it up to date would not have been so great.

"Q. What other elements do you take at fixing the value as of October 31, 1928, beside the cost of bringing the plant up to date?

"A. The question of marketability.

"Q. How would that be affected?

"A. Why, greatly. Any asset of any kind which is discarded, allowed to deteriorate, and then attempted to be sold as a second-hand used article, depreciates in value; and the title plant does, in the same way, the same as the ordinary" (R. 77, 78).

* * * * * * *

"Q. Well now, what effect, as far as the value of the plant is concerned, taking it out of use and storing it down in the basement, would it have on the plant?

"A. It would deteriorate most rapidly (Tr. 135, 136).

"Q. You testified it would deteriorate from not being kept up. Would that have any other effect on possible purchasers of the plant?

"A. It certainly would. Possibly a purchaser of anything in the way of a second-hand article is going to figure, as Mr. Mecutchen brought out, what it is going to cost to bring it up. It is a second-hand article. He can go and buy a cheaper new article of a modern make that will answer his purpose just as well, and he is not going to buy a second-hand article that he has got to spend money on, if he can buy something else that answers his purpose, cheaper, and is not anything as good.

"Q. And was it known the reason this was discarded for The Real Estate-Land Title plant was on account of its high cost of operation?

"A. Yes. Throughout all title circles of Philadelphia where there was a possible market for this plant everyone knew that the Land Title's plant had been discarded and the Real Estate Title plant was the one that was going to be used.

"Q. And they knew the reason for it?

"A. Every title company in town knew it, and every company in town knew the reason why, on account of the expensive mode of operation. It was discussed at title meetings; representatives of title companies talked it over" (R. 96).

The learned Trial Judge also found as follows:

(h) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and the fair market value of the said title

plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 298).

In Mr. Mecutchen's testimony we find the following (R. 102).

> "Q. You were familiar, of course, in your testimony yesterday, with the plant of the Land Title and Trust Company, where you were working on March 1st, 1913?
>
> "A. Yes (Tr. 147).
>
> "Q. What, in your opinion, was the fair value of that title plant at that time?
>
> "A. I think it was worth, in my opinion, a million dollars.
>
> "Q. And you were equally familiar with the plant on October 31, 1928, a year after the merger? What in your opinion—your answer to that is yes?
>
> "A. Yes, that is true.
>
> "Q. What, in your opinion, was the fair value of the plant at that time?
>
> "A. Not over a hundred to $125,000."

In this connection Mr. Robins testified as follows (R. 74, 75 and 76):

> "Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st, 1913?
>
> "The Witness:—March 1st, 1913, I would say I am of the opinion that the title plant of the Land Title and Trust Company was worth one million and a quarter dollars" (R. 74, 75).
>
> * * * * * * *
>
> "Q. I am asking you now, under the conditions which you heard testified to yesterday by Mr. Mecutchen, what, in your opinion, was the fair value of that plant as it was a year after the merger in October 31, 1928?

"A. It was worth just about what you could get for it. I would not believe you could have gotten over $100,000 at the outside.

"Q. Then, in your opinion, the outside fair value of the plant on October 31, 1928, would be $100,000?

"A. About $100,000. Somewhere between fifty and a hundred. You couldn't find a purchaser for that" (R. 76).

The above Findings of the Trial Judge were filed after J. Willison Smith, President of the taxpayer corporation, Peirce Mecutchen, Title Officer of the taxpayer corporation, and Henry R. Robins, President of the Commonwealth Title Company of Philadelphia, had testified in open court. These men are respected citizens of the community of many years experience in the title business, and were qualified to testify on matters of this character as well as, if not better than, anyone else. They were all cross-examined by counsel for the Government and were questioned by the Trial Judge, after which the above Findings were filed. It is submitted that the Trial Judge could have had no better evidence on which to base his Findings of Fact in this case, and the foregoing quotations from the record clearly prove that there was ample testimony to support his Findings.

4. The Circuit Court of Appeals erred in directing the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the Trial Judge, in that his Findings of Fact are conclusive and fully sustain his Conclusions of Law.

This proceeding was instituted under the Tucker Act, which in Section 7 thereof (28 U. S. C. A. Section 764) provides as follows:

> "It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and

the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge are set forth at length on pages 287 to 306 inclusive of the Record.

It is clear from the testimony quoted under the preceding heading that there is ample evidence to support the Findings of the Trial Judge, *and since this is so, the Findings of the Trial Judge are conclusive.* The only question then is whether or not the Conclusions of Law of the Trial Judge are supported by his Findings of Fact.

In *United States* v. *Buffalo Pitts Company,* 234 U. S. 228 (1914), a proceeding instituted under the Tucker Act in which this question arose, Mr. Justice Day in his opinion stated, at p. 232:

> "In cases brought under this act coming up from a District or Circuit Court of the United States *the findings of fact of the trial court are conclusive,* and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States,* 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by *any evidence whatever (Collier* v. *United States,* 173 U. S. 79)." (Italics ours.)

From the above quotation from the opinion of Mr. Justice Day it is clear that if the facts found by the Trial Judge in the court below are supported "by any evidence whatever," his findings are conclusive, and therefore, the only question for this Court is whether the Conclusions of Law and judgment originally entered in the District Court are supported by the facts found by the Trial Judge.

In *Chase* v. *The United States,* 155 U. S. 489 (1894), Mr. Justice Harlan stated in his opinion, at page 500:

"But under that Act [the Tucker Act] a judgment of a District or Circuit Court of the United States in an action at law brought against the Government, will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this Court will only inquire whether the judgment below is supported by the facts thus found."

See also *Wessel, et al.* v. *United States*, 49 Fed. (2d) 137 (C. C. A. 8th, 1931), and *United States* v. *Union Trust Co. of Indianapolis, et al.*, 90 Fed. (2d) 702 (C. C. A. 7th, 1937), both of which arose under the Tucker Act and involved claims for refund of tax.

In the *Wessel* case Judge Kenyon in his opinion states (p. 139):

"The special findings of fact by the trial court have the same effect as the verdict of a jury. Cramp *v.* United States, 239 U. S. 221, 36 S. Ct. 70, 60 L. Ed. 238; Crocker *v.* United States, 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533; Brothers *v.* United States, 250 U. S. 88, 39 S. Ct. 426, 63 L. Ed. 859; Stone *v.* United States, 164 U. S. 380, 17 S. Ct. 71, 41 L. Ed. 477."

In the *Union Trust Company* case Judge Major in his opinion states (p. 703):

"It is not the province of this court to weigh the evidence or analyze the same except to the extent of ascertaining if the ultimate fact found by the trial court is supported by *any* evidence." (Italics ours.)

And again (p. 703):

"While there is evidence in the record inconsistent with such ultimate finding by the trial court and evidence from which a contrary conclusion might be reached, yet there is evidence which supports it. The testimony of Mrs. Atwater with reference to the gift,

corroborated to some extent by Mrs. Roach, substantially justifies the finding of the trial court in the respect indicated."

In this connection attention is called to Rule 52 (a) of the new *Federal Rules of Civil Procedure* entitled, "Findings by the Court," which rule is in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 23 of the Act of Congress approved May 29, 1928 (45 Stat. 795), known as the Revenue Act of 1928, provides in part as follows:

> **§23. Deductions from Gross Income**
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * * *
>
> **(f) Losses by Corporations.** In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.
>
> **(g) Basis for Determining Loss.** The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.
>
> * * * * * * *
>
> **(k) Depreciation.** A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * * *

The provisions of the above quoted section of the Revenue Act of 1928 when applied to the Findings of

Fact set forth under the preceding heading of this brief, clearly support the following Conclusions of Law made by the learned Trial Judge:

"6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company" (R. 300).

"7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company" (R. 300).

"8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928" (R. 300).

"9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000" (R. 301).

His Honor, Judge Biggs, in the Circuit Court of Appeals in the instant case said, *inter alia:*

"To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was

not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the year 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view" (R. 325).

It is submitted that the above holding of Judge Biggs is contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge, and since there is ample evidence to sustain the findings of the Trial Judge, and his findings in turn support his Conclusions of Law and the judgment entered in the District Court, it was clearly error for the Circuit Court of Appeals to reverse this judgment which was based upon and supported by these findings and conclusions. It is therefore submitted that this Honorable Court should exercise its power of supervision and reverse the judgment of the Circuit Court of Appeals.

5. On the record in this case taxpayer is clearly entitled to a deduction on the theory of abandonment as well as on the theory of obsolescence.

There appears to be no question but that taxpayer may claim the deduction herein contended for on the theory of obsolescence. We submit that this deduction is properly allowable also on the theory of abandonment.

The Circuit Court of Appeals, however, appeared to be of the opinion that this deduction could not be allowed on the theory of abandonment, in view of the claim for refund filed by taxpayer in this case.

In his opinion, Judge Biggs states (R. 325, 326):

"In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee.

* * * * * * *

"It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

It is respectfully submitted that the Circuit Court of Appeals was clearly in error in taking this view.

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of the taxpayer's claim and to afford him an opportunity of correcting errors made by his office.

On this point Mr. Justice Stone in his opinion in *Tucker* v. *Alexander*, 275 U. S. 228 (1927), states (page 231):

"The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial."

In *Wunderle* v. *McCaughn*, 38 Fed. (2d) 258 (D. C. E. D. Pa., 1929), Judge Kirkpatrick in his opinion states (page 260):

"The requirement of the statute (26 U. S. C. A. sec. 156) is 'a claim for refund or credit * * * according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *' The regulations in force require that 'all the facts relied upon

in support of the claim shall be clearly set forth under oath.' In Tucker *v.* Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' In the opinion of the lower court in the same case (reversed upon the question of waiver, but not disapproved upon the point here involved) it was pointed out that the principal purpose of the condition was to afford the Commissioner an opportunity to correct errors made by his office."

In the case at bar we respectfully refer the Court to the communication from the Deputy Commissioner of Internal Revenue dated February 11, 1931, advising taxpayer that its claim for refund would be rejected, in which communication the Deputy Commissioner states (R. 13):

> "Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned;*" (Italics ours).

The above quotation clearly shows that the question of *abandonment* was submitted to the Commissioner of Internal Revenue by taxpayer in support of its claim.

In *Warner* v. *Walsh*, 24 Fed. (2d) 449 (D. C. Conn., 1927) the claim for refund was filed on the theory that the amount received by the taxpayer from the estate of her deceased husband was a bequest or a legacy, and therefore not subject to income tax. The court held the income not subject to tax on the theory that the widow by giving up her statutory rights in the estate was purchasing an annuity. The question was raised that this theory had

not been advanced in the claim for refund, and on this point Judge Thomas in his opinion states (p. 450):

"The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable. In Union & New Haven Trust Co. *v.* Eaton, Collector, 20 F. (2d) 419, decided by this court on June 2, 1927, it was held that a plaintiff, suing for a refund, is not barred from setting up a ground for relief which was not specified in his claim for refund. There this court said: 'To hold, therefore, that a plaintiff is precluded from asserting a reason * * * not advanced in his notice of claim, is to read a condition into the statute not legislated by Congress.'

"Assuming, however, that the facts upon which a claim for refund is predicated must be incorporated in the notice of claim, and assuming that the plaintiff is precluded from setting up any further facts in her complaint, I cannot find that the notice of claim filed in the case at bar is deficient. The Commissioner is therein apprized of all of the material facts. It is true that the *theory* of the relief is not set out. But the theory of a claim for relief is something separate and apart from the facts, and the same set of facts may, and often does, give rise to differing theories. To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."

In *Warner* v. *Walsh*, 27 Fed. (2d) 952 (D. C. Conn., 1928), on this same point Judge Burrows in his opinion states (page 953):

"The defendant's second claim is that the taxpayer never presented in writing to the Commissioner of Internal Revenue the 'alleged purchase for value theory' as a ground for her claim for refund, and therefore the claim for refund was never properly presented, or considered within the meaning of the statutes, and hence this action will not lie. This claim was made to the court in the previous case of Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and in the case of Union & New Haven Trust Co. *v.* Eaton, Collector (D. C.) 20 F. (2d) 419, and in both cases, Judge Thomas held this claim untenable, and I concur in this view."

In *Wunderle v. McCaughn, supra,* Judge Kirkpatrick, of the same court in which the case at bar was tried, said in his opinion at page 260:

"I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giving rise to the claim, is a sufficient compliance with the statute, and, further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund.

* * * * * * *

"I am in accord with the view expressed in Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and the opinion of Union & New Haven Trust Co. *v.* Eaton (D. C.) 20 F. (2d) 419, that, where the Commissioner is apprised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. Nor, I think, is it material that the wrong theory is set

out. That is particularly true in a case like this in which the claim involves a narrow and sharply defined issue."

In *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa., 1927), the defendant demurred, alleging, *inter alia*, that the statement of claim was insufficient in that it did not exhibit the claim for refund which it alleged was filed and rejected, and did not allege or set forth that the ground upon which the action was based was presented to the Commissioner in the said claim. On this question Judge Kirkpatrick in his opinion stated (p. 460):

"*No copy of the claim for refund is attached to the statement.* The statement of claim does allege that 'plaintiff duly filed with defendant claim for refund in the sum of $11,854.79.' and that the claim was rejected, and at the argument a motion to amend the statement by attaching a copy was made and the amendment allowed. *An inspection of the paper shows that it does not include the claim now made.* However, a copy of the notice of rejection from the Commissioner of Internal Revenue is attached to the statement, which contains the following:

" 'Mortgages, Notes, Cash, and Insurance.	Returned.	Determined.	Adjusted.
Equitable Life Assurance Society policy	$101,000	$101,000	$101,000

" 'It is contended by the estate that the ruling of the bureau in including in the decedent's gross estate all of the above insurance is erroneous. A further review has been made by this office in connection with the above protest, careful consideration being given to the brief submitted by the estate on the question involved. The bureau is, however, unable to change

its former ruling, arrived at as the result of the conference held in this office, and therefore the determination, as shown in the closing letter, will be adhered to. *Your claim in connection with this question is, therefore, rejected.*'" (Italics ours.)

After quoting from the notice from the Commissioner of Internal Revenue, rejecting taxpayer's claim in the *Union Trust Co.* case as above set forth, Judge Kirkpatrick in his opinion continues (pages 460, 461):

"From this it appears that the matter of the inclusion of the life insurance policy in the decedent's gross estate, which is the basis of this suit, was presented to the Commissioner, and that it was considered and rejected by him. As stated in the opinion in Tucker *v.* Alexander, *supra:* 'The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto.'

"(3) *If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application.' It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so.* I am therefore of the opinion that, so far as this requirement of the statute is concerned, the statement sets out a sufficient cause of action." (Italics ours.)

The situation in the case at bar is analogous to that in the *Union Trust Co.* case, *supra,* in that in the case at

bar the letter from the Deputy Commissioner advising that taxpayer's claim would be rejected (R. 13) clearly shows that the Commissioner considered the question of abandonment.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year" (R. 7).

In its answer the defendant denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the Court should determine that the plant had been abandoned. Nor was this question raised by the Government at the trial of this case.

Therefore if the Court should be of the opinion that there is a variance between the grounds alleged in the claim for refund and the grounds alleged in the petition filed in the District Court, which we do not admit, it is submitted that the Government can waive any right it may have to raise this question, and it is also submitted that by not raising it either in its answer or in the District Court, the Government has waived this right.

In *Tucker* v. *Alexander*, 275 U. S. 228, *supra*, the taxpayer was the owner of shares of stock in a corporation which was dissolved and liquidated during the year 1920. A distribution of some portion of the corporation's assets had been made to stockholders in May of 1913. On the dissolution the Commissioner of Internal Revenue taxed as income the difference between the value of the

property received by taxpayer as a liquidating dividend, and the value of stock on March 1, 1913 less the value of the distribution made in May of 1913, which distribution was treated as a return of capital.

Taxpayer paid the tax under protest, and filed a claim for refund assigning as reasons for his claim (1) the Commissioner's erroneous computation of the March 1, 1913 value of the stock, and (2) the Commissioner's failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders.

There was no explicit statement made in the claim for refund that the Commissioner had erred in decreasing the March 1, 1913 value by the value of the property distributed in May, 1913, nor was that point raised by the petition filed in the District Court, which in effect merely repeated the allegations of the claim for refund.

In the course of the trial taxpayer, without objection by the Government, abandoned the grounds of recovery stated in the petition and attacked only the action of the Commissioner in deducting from the March 1, 1913 value, the value of the distribution made in May of 1913. This was apparently a question as to whether the distribution of May, 1913 was a return of capital, or the distribution of a dividend. That issue alone was litigated. At the close of the trial counsel stipulated that if the court found the deduction to have been made erroneously, the taxpayer should have judgment in a sum named. The judgment entered against taxpayer in the District Court was affirmed by the Court of Appeals for the Eighth Circuit (15 Fed. (2d) 356) *in an opinion holding that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes, as amended.*

Mr. Justice Stone, of the Supreme Court of the United States, *in reversing the judgment and holding that the*

taxpayer was not precluded from recovering in that case, said (pages 230, 231):

"In our view of the case, the question considered by the circuit court of appeals was not properly before it, and it should have passed upon the merits. *During the entire course of the trial no question was raised as to the sufficiency of the claim for refund.* The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.

"If the Collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed, it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.

"Literal compliance with statutory requirements that a claim of appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 353, 354; *Nichols* v. *United States,* 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure

to observe them does not necessarily preclude recovery." (Italics ours.)

See also *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa., 1927), *supra*.

There is no question but that taxpayer herein sustained a substantial loss, in that during the taxable year in question a title plant owned by taxpayer lost a very large part of its value, and it is clear therefore that taxpayer is entitled to a deduction for this loss whether it be considered that the loss was sustained through obsolescence or abandonment. In either event it is a loss in connection with a title plant, and from the record it is apparent that the Commissioner of Internal Revenue was thoroughly familiar with taxpayer's claim.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment originally entered by the District Court affirmed.

Respectfully submitted,

MAURICE BOWER SAUL,
JOSEPH NEFF EWING,
Counsel for Petitioner.

JOSEPH A. LAMORELLE,
MURRAY FORST THOMPSON,
Of Counsel.

APPENDIX.

STATUTES INVOLVED.

The law applicable to this case is the Act of Congress approved May 29, 1928 (45 Stat. 795) known as the Revenue Act of 1928. The pertinent provisions of this statute are as follows:

"**Section 1. Application of Title**

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years.

§48. Definitions

When used in this title—'

(a) Taxable Year. 'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928.

(b) Fiscal Year. 'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

§23. Deductions from Gross Income

In computing net income there shall be allowed as deductions:

• • • • • • •

(f) Losses by Corporations. In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(g) Basis for Determining Loss. The basis for

determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.

* * * * * * *

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * * * *

(m) Basis for Depreciation and Depletion. The basis upon which depletion, exhaustion, wear and tear and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

§114. Basis for Depreciation and Depletion

(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.

§113. Basis for Determining Gain or Loss

(a) Property Acquired After February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to corporation where control of property remains in same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such prop-

erty of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * * *

(b) Property Acquired before March 1, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913 shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

§112. Recognition of Gain or Loss

(b) (4) Same—Gain of corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

* * * * * * *

No. 229

In the Supreme Court of the United States

October Term, 1939

The Real Estate-Land Title and Trust Company, petitioner

v.

United States of America

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the trial court (R. 410-417) is not reported. The opinion of the Circuit Court of Appeals (R. 459-466) is reported in 102 F. (2d) 582.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1939 (R. 467). A petition for rehearing (R. 469-484) was filed April 11, 1939, and was denied May 1, 1939 (R. 485). The

petition for a writ of certiorari was filed July 26, 1939. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, upon its incorporation, became the owner of two duplicate title abstract plants designed and used for the same general purpose. Prior to the commencement of the taxable year one was stored, without thereafter being kept up-to-date. Does the loss of its useful value to petitioner constitute obsolescence that is deductible from gross income, or is it merely attributable to deliberate duplication of facilities for which no deduction is allowable?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 9–13.

STATEMENT

This suit was instituted by the petitioner to recover income taxes paid with respect to its fiscal year ending October 31, 1928.

The petitioner is the product of a merger of three corporations which was consummated on October 31, 1927, pursuant to an agreement of October 3, 1927 (R. 31–34). Two of the constituent corporations, the Real Estate Title Insurance and Trust Company and the Land Title and Trust

Company, had been engaged in the title insurance business, and together owned two of the three principal title abstract plants in Philadelphia (R. 53). For purposes of the merger the two plants were valued at $800,000 each, although immediately prior thereto the Land Title plant had been carried at $275,000 and the Real Estate Title plant at $143,000 (R. 34–35). Before and at the time of the merger the parties thereto knew that the new corporation was about to acquire two title plants designed and used for the same general purpose (R. 35).

Both were excellent plants, and the same results could be obtained from each. Together they constituted the two most complete plants in the city (R. 116–117). A committee designated in October 1927 by the combining companies to determine which of the two plants would be used by the new corporation recommended prior to the merger that the Real Estate Title plant be tried in view of greater economy in operation (R. 49, 74–75). Accordingly, the records comprising the Land Title plant were stored in a basement, and by the latter part of October 1927 the daily additions required to keep the plant up-to-date were discontinued (R. 50). Thereafter, the only use made of those records was to ascertain what insurances were involved in connection with the forthcoming November sheriff's sales, and "from time to time, there has been, very occasionally, a check-up of some in-

formation from material in the plant to save a visit to City Hall" (R. 83).

During 1928, the petitioner attempted to sell the stored plant to a prospective purchaser for $1,000,000 (R. 61–62, 424). The good will of that plant was said to be "very substantial" (R. 140–141). There was no testimony as to any improvements in the art of title insurance or as to any new or improved methods the lack of which would result in obsolescence of a plant not having those advantages.

In its reports to the Pennsylvania Department of Revenue for the two-month period ended December 31, 1927, and for the calendar years 1928, 1929, and 1930, petitioner listed among its assets an item designated as "Title Plant," valuing it first at $1,600,000, but showing a reduction of $50,000 therefrom for each succeeding year. The reports for the years 1931 and 1932 specifically indicated that the item "Title Plant" referred to both plants, and stated that since they were duplicates "one of them was of no further use" and was being amortized (R. 42–45).

The District Court ruled that petitioner was entitled to a deduction on account of obsolescence for its fiscal year ended October 31, 1928, in the amount of $875,000 (R. 417). The Circuit Court of Appeals reversed, holding that no deduction for obsolescence was allowable.

ARGUMENT

1. Petitioner's loss of usefulness of the title plant was attributable to a deliberate duplication of facilities and was not due to obsolescence. Neither changing economic conditions nor any other circumstance within any established definition of obsolescence produced the condition for which petitioner now claims a deduction of $875,000 and a refund of over $100,000 in taxes.

The primary reason advanced for the allowance of the writ is an alleged conflict with *Crooks* v. *Kansas City Title & Trust Co.*, 46 F. (2d) 928 (C. C. A. 8th). There are, however, basic differences between the two cases. In the *Crooks* case, six abstract plants were acquired in March 1915. The deduction with respect to obsolescence was sought for four of them but was not claimed until 1921, when it was first determined that the property would become completely useless in 1930. The taxpayer asserted its right merely to a pro rata portion of the deduction which it spread evenly over the period 1921–30. Moreover, during the period 1915–21, the taxpayer actually used at least some of the assets in those four plants, and it took some three years to go through all of the various records selecting and arranging the material that could be used.

In the instant case, on the other hand, the plant was stored in a basement immediately upon acquisi-

tion in October 1927. The customary daily additions to the records required to keep the plant up-to-date were discontinued at once. The plant was not used again in connection with new searches of property but was referred to in November 1927 merely to ascertain what insurances were involved in the forthcoming sheriff's sales for that month. Both plants were in excellent condition; petitioner merely selected the one that was less expensive to operate, putting aside the other. Duplication and not obsolescence caused the loss of useful value to petitioner. The plant itself did not become useless; in fact negotiations were under way during the tax year to sell it for $1,000,000. It seems plain that the plant could not have become obsolete during the year, and that any partial reduction in value occurring through failure to keep it up-to-date was attributable to circumstances under petitioner's control.

These facts sharply distinguish the instant case from the *Crooks* case. The Circuit Court of Appeals correctly determined as a matter of law that the facts here presented do not bring this case within the statutory deduction. It did not decide that title plants cannot be the subject of obsolescence deductions; nor did it depart, as charged by petitioner, from any finding of the District Court. It merely ruled that the deduction is not allowable upon the facts shown.[1] There is no occasion for

[1] The Circuit Court of Appeals would have been justified in denying the deduction on the ground that the stored plant

this Court to grant certiorari and explore anew the facts in this record to determine whether Congress intended the deduction to apply to the peculiar situation here presented.

2. As an additional ground for the deduction, petitioner builds an argument around the word "abandonment" (Pet. 10–11). However, abandonment *per se* is not a basis for deduction, and petitioner points to no statute that allows a deduction solely by reason of abandonment. It is merely an identifiable event which may bring into play some specific statutory deduction. Thus, an abandonment may serve to render deductible a hitherto unrealized loss. But no deduction was here claimed under the separate provisions of the statute allowing deductions for losses. The only specific deduction here claimed is that based upon obsolescence, and if there has been any abandonment [5] it

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was not used in the business within the meaning of the statute. *Buckwalter* v. *Commissioner*, 61 F. (2d) 571, 572 (C. C. A. 6th). However, it assumed that for the purpose of this case there was a sufficient use to satisfy the statute but observed that "That use at most was very slight" (R. 462).

If certiorari should be granted we would undertake to support the result below upon this further ground that the plant was not employed in trade or business within the meaning of Section 23 (k) of the Revenue Act of 1928.

[5] In any event, it is clear that there was no abandonment. The plant was stored. It was valued at a million dollars during 1928, and the trial court itself even found a "salvage" value of $125,000 as of October 31, 1928 (R. 425). When such an asset is placed in storage it is a contradiction in terms to say that it has been abandoned.

at most merely implements that claim, which has been answered above.

CONCLUSION

The case depends largely upon its own facts and was correctly decided below. There is no conflict. The petition should be denied.

Respectfully submitted.

ROBERT H. JACKSON,
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Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
ARNOLD RAUM,
LESTER L. GIBSON,
Special Assistants to the Attorney General.

SEPTEMBER 1939.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * *

Treasury Regulations 74 (1929 Ed.):

ART. 173. *Loss of useful value.*—When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (ad-

justed as provided in section 111 and article 561) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any produc makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income.

ART. 201. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in

accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property in the business, equal the basis of the property determined in accordance with section 113 and articles 591–604. Due regard must also be given to expenditures for current upkeep. In the case of property held by one person for life with remainder to another person, the deduction for depreciation shall be computed as if the life tenant were the absolute owner of the property so that he will be entitled to the deduction during his life, and thereafter the deduction, if any, will be allowed to the remainderman. In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee.

ART. 202. *Depreciable property.*—The necessity for a depreciation allowance arises

from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, nor to land apart from the improvements or physical development added to it. It does not apply to bodies of minerals which through the process of removal suffer depletion, other provisions for this being made in the Act. (See sections 23 (1) and 114 and articles 221–257 and 611.) Property kept in repair may, nevertheless, be the subject of a depreciation allowance. (See article 124.) The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business. No such allowance may be made in respect of automobiles or other vehicles used solely for pleasure, a building used by the taxpayer solely as his residence, nor in respect of furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be the subject of a depreciation allowance.

ART. 206. *Obsolescence.*—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a

future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.

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No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the trial court (R. 287–292) is not reported. The opinion of the Circuit Court of Appeals (R. 319–326) is reported in 102 F. (2d) 582.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1939. (R. 327.) A petition for rehearing was denied May 1, 1939. (R. 328.) The petition for a writ of certiorari was filed July 26, 1939, and was granted October 9, 1939. (R. 329.) The jurisdiction of this Court rests on Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Taxpayer, upon its incorporation, became the owner of two duplicate title abstract plants designed and used for the same general purpose. Immediately upon acquisition and prior to the commencement of the taxable year one was stored, without thereafter being kept up-to-date.

1. Does the lack of utility to taxpayer of the stored plant result from obsolescence that is deductible from gross income, or is it merely attributable to deliberate duplication of facilities for which no deduction is allowable?

2. If taxpayer is not entitled to an obsolescence deduction, is it entitled to a loss deduction on account of the lack of utility to it of the stored plant?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 48–51.

STATEMENT

This suit was instituted by the taxpayer to recover income taxes paid with respect to its fiscal year ending October 31, 1928.

The taxpayer is the product of a merger of three corporations which was consummated on October 31, 1927, pursuant to an agreement of October 3, 1927. (R. 20–22.) Two of the constituent corporations, the Real Estate Title Insurance and Trust Company and

the Land Title and Trust Company, had been engaged in the title insurance business, and together owned two of the three principal title abstract plants in Philadelphia. (R. 35.) For purposes of the merger the two plants were valued at $800,000 each, although immediately prior thereto the Land Title plant had been carried at $275,000 and the Real Estate Title plant at $143,000. (R. 22.) Before and at the time of the merger the parties thereto knew that the new corporation was about to acquire two title plants designed and used for the same general purpose. (R. 22–23.) Only one such plant could be used advantageously by any one company. (R. 29, 118–119, 123.)

Both were excellent plants, and the same results could be obtained from each. Together they constituted the two most complete plants in the city. (R. 80.) A committee designated in October, 1927, by the combining companies to determine which of the two plants would be used by the new corporation recommended prior to the merger that the Real Estate Title plant be tried in view of greater economy in operation. (R. 31–32, 50–51.) Accordingly, the records comprising the Land Title plant were stored in a basement, and by the latter part of October, 1927, the daily additions required to keep the plant up-to-date were discontinued. (R. 32–33.) Thereafter, the only use made of those records was to ascertain what insurances were involved in connection with the forthcoming November sheriff's sales, and "from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall". (R. 57.)

During 1928, the taxpayer set a price upon the stored plant to a prospective purchaser of $1,000,000. (R. 33–34, 41, 297.) The good will of that plant was said to be "very substantial". (R. 96–97.) There was no testimony as to any improvements in the art of title insurance or as to any new or improved methods the lack of which would result in obsolescence of a plant not having those advantages.

In its report to the Pennsylvania Department of Revenue for the two-month period ended December 31, 1927, and for the calendar years 1928, 1929, and 1930, taxpayer listed among its assets an item designated as "Title Plant," valuing it first at $1,600,000, but showing a reduction of $50,000 therefrom for each succeeding year. The reports for the years 1931 and 1932 specifically indicated that the item "Title Plant" referred to both plants, and stated that since they were duplicates "one of them was of no further use" and was being amortized. (R. 27–29.)

Ownership of a complete land title abstract plant is an invaluable aid in obtaining title insurance business (R. 36), and is a source of great prestige (R. 119). Certain important customers, such as large mortgage and insurance companies, would not give their title insurance business to a company which did not own such a plant. (R. 36, 119.) Taxpayer never advertised the Land Title plant for sale (R. 34), although two companies might have been interested in its purchase (R. 119). There is no evidence that taxpayer ever offered to sell the plant for less than $1,000,000, although it is financially impossible for one company to operate two

plants. (R. 123.) The suppression of one of the three existing abstract plants was a financial benefit to the other companies owning such plants, since the elimination of competition among the so-called plant companies was highly advantageous. (R. 119–120.)

The District Court ruled that taxpayer was entitled to a deduction on account of obsolescence for its fiscal year ended October 31, 1928, in the amount of $875,000. (R. 292.) The Circuit Court of Appeals reversed, holding that no deduction for obsolescence was allowable.

SUMMARY OF ARGUMENT

The inutility to taxpayer of the Land Title plant arises from deliberate duplication of assets, which, as a matter of law, is not an occasion for an obsolescence allowance. It is not comprehended within any established definition of obsolescence, nor is the purpose of the statute such as to include it. Since it was known at the time of the merger that taxpayer would acquire duplicate plants, there was no intention to use one of them at time of acquisition. Accordingly, whatever loss petitioner may have suffered was attributable, not to obsolescence, but to deliberate duplication of facilities.

Moreover, the necessary period of obsolescence, of a duration greater than the taxable year, has not been established by taxpayer. Even if the circumstances were such as to satisfy the legal prerequisites for an obsolescence deduction, taxpayer's claim must be denied because the Land Title plant did not in fact become obsolete during the taxable year.

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The court below indicated that it did not believe that taxpayer had satisfied the statutory requirement of *use* in the trade or business, but did not rest its decision upon that ground. The Circuit Court of Appeals would have been entirely justified in denying the obsolescence deduction for failure to satisfy that statutory requirement, for there is no adequate evidence to support the finding that the Land Title plant was "used" in the trade or business of taxpayer.

Taxpayer's contention that it is entitled to a deduction on the theory of abandonment, under the loss provision of the statute, Section 23 (f), is ill founded. First, taxpayer may not now raise the question of an abandonment deduction because its claim for refund was predicated exclusively on obsolescence, under Section 23 (k), and only the question of an obsolescence allowance was presented to, or considered by, the District Court. Furthermore, even if the issue is properly before the Court, it is without substance. The plant in question was never abandoned; it had substantial value and was simply stored.

Moreover, the record persuasively shows that the purpose motivating the acquisition of the Land Title plant was the desire to eliminate competition. Therefore, the obsolescence deduction and the loss deduction on grounds of abandonment should both be denied for that reason as well.

If it be held, notwithstanding the foregoing considerations, that taxpayer is entitled to some deduction, we then urge that the amount allowed by the District Court is grossly excessive. The court erred in not reducing the allowance by the value of that portion of the plant

which was not allegedly obsolete or abandoned. Moreover, the basis founded upon the March 1, 1913 value found by the District Court is excessive and not supported by the evidence. There was also error in the failure to exclude the value of the plant's good will in calculating the deduction, since good will is not a proper subject for an obsolescence allowance.

ARGUMENT

I

THE COURT BELOW CORRECTLY HELD THAT TAXPAYER IS NOT ENTITLED TO ANY DEDUCTION UNDER THE PROVISIONS OF SECTION 23 (k) OF THE REVENUE ACT OF 1928

In denying the claimed deduction on account of the alleged obsolescence of the Land Title plant, the court below based its decision upon two distinct grounds. Taxpayer is not entitled to a deduction under Section 23 (k) because (1) as a matter of law, duplication of assets is not a proper occasion for an obsolescence allowance; and (2) the Land Title plant did not in fact become obsolete during the taxable year. We contend that the Circuit Court of Appeals was correct in both respects, and that either ground is adequate to sustain the result below.

A. AS A MATTER OF LAW, DUPLICATION OF ASSETS IS NOT A PROPER OCCASION FOR AN OBSOLESCENCE ALLOWANCE

1. The term "obsolescence", as used in the Revenue Act, has been defined generally as the "condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions." See *Burnet* v. *Niagara Brewing*

Co., 282 U. S. 648, 654.[1] This Court, while refraining from formulating any comprehensive definition, has stated that "Obsolescence may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value." *United States Cartridge Co.* v. *United States*, 284 U. S. 511, 516; *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648; *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638.[2]

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[1] The Bureau of Internal Revenue has defined obsolescence "as the process of becoming obsolete, brought about by the progress of the arts and sciences, changed economic conditions, legislation, or otherwise, whereby it can be predicted with reasonable accuracy that property used in the trade or business will be useless at a definite future date prior to the expiration of the normal useful life of the property." Bureau Bulletin "F" (January, 1931) 2. See also Article 206, Regulations 74, Appendix, *infra*. p. 51.

[2] It may be noted, at this point, that there are two generally recognized and more or less distinct types of obsolescence. The first, frequently designating "extraordinary obsolescence", involves a relatively sudden diminution of useful value consequent upon some radical change, while the second contemplates a gradual exhaustion of the utility of a particular property due to the accumulated effect of small improvements or changes introduced from time to time in the art or industry generally which render the property relatively less efficient, and which experience shows are practically certain to occur. Obsolescence of the second type can usually be anticipated with the same degree of accuracy as ordinary depreciation through physical exhaustion and wear and tear, and is frequently referred to as "normal obsolescence". No separate cognizance is taken of such normal obsolescence, its existence being recognized, if at all, in the fixing of the annual depreciation rate. See 2 Paul and Mertens, *Law of Federal Income Taxation*, Section 20.41; Montgomery, *Federal Income Tax*

In asserting that taxpayer is not entitled to the deduction for obsolescence allowed by Section 23 (k) of the Revenue Act of 1928, we do not contend, as taxpayer implies (Br. 17), that a title abstract plant may not, when the requisite facts have been shown, be a proper subject for an obsolescence deduction. Our position is predicated upon the taxpayer's total failure to demonstrate and upon the absence of any finding that the inutility to it of the Land Title plant was attributable to any circumstance comprehended within the established definitions of obsolescence or within this Court's enumeration of the types of occurrences giving rise to it, as set out above. Aside from the merger creating the taxpayer corporation, as a result of which taxpayer came into possession of two duplicate plants, and taxpayer's consequent voluntary discontinuance of current entries in the Land Title plant, the record is totally devoid of even the suggestion that there occurred any change in the conditions affecting the business of title insurance in Philadelphia tending to decrease the utility of the Land Title plant during the taxable year. No loss of trade, shifting of business centers, or substantial diminution in the need for the services of title insurance companies has been shown. Moreover, there is no testimony in the record to the effect that the Land Title plant was rendered obsolete by the development of new or improved techniques for the collection, re-

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Handbook (1936–1937) 674–675; Bureau of Internal Revenue Bulletin "F", January, 1931. But even in the case of "extraordinary" obsolescence there must be a period in excess of one year; otherwise, the deduction must be sought under the loss provisions of the statute rather than as an allowance for obsolescence. See pp. 16–22, *infra*.

cording, or utilization of information pertaining to real estate titles.[9] Neither was there a showing of prohibitory or restrictive legislation, supersession, or other factor having deleterious effect upon the usefulness of the Land Title plant. Both of taxpayer's plants were designed and used for the same general purpose. (R. 22–23.) Presumably, therefore, if the alleged obsolescence were the result of any of the foregoing factors, both plants would have been equally affected, yet no claim for an obsolescence deduction was made on account of taxpayer's other plant. The court below was thus correct in stating that such impairment of the utility of the Land Title plant as occurred during the taxable year was caused solely by voluntary duplication and taxpayer's consequent decision to store the plant and refrain from making the daily entries necessary to keep it up to date.

We submit that voluntary duplication of assets, as a matter of law, is not an occasion for an obsolescence deduction, and that the court below rightly so held. Voluntary duplication is not comprehended within any established definition of obsolescence, or this Court's enumeration of the types of situations which may constitute occasions for an obsolescence allowance. Moreover, as pointed out by the Circuit Court of Appeals, this Court's statements as to the circumstances giving rise to obsolescence and the accepted definitions of the term both indicate that the purpose of the statute in

[9] There was evidence that some plants had adopted photostating devices, but it was not shown that the absence of such equipment rendered a plant obsolete, and indeed the taxpayer herein did not employ such equipment in either of its plants (R. 87).

granting the allowance is to permit a taxpayer to regain capital invested by him in machinery, equipment or other property when such machinery, equipment or other property becomes less useful because time itself brings improvements or changed conditions. See *Columbia Malting Co.* v. *Commissioner,* 1 B. T. A. 999, 1001; *Corsicana Gas & Electric Co.* v. *Commissioner,* 6 B. T. A. 565, 568–569. As concisely stated by the court below, "obsolescence may be claimed when machinery or a plant suffers loss in use not because of action or lack of it upon the part of the taxpayer, but because of the effect of general conditions over which he has no control." (R. 324.)

We are aware of no authority holding that a deduction for obsolescence is allowable where the uselessness of an asset arises solely from unnecessary and deliberate duplication and a consequent voluntary failure to maintain the duplicated asset in perfect operating order. Taxpayer cites and places principal reliance (Br. 15–17) upon the decision of the Circuit Court of Appeals for the Eighth Circuit in *Crooks* v. *Kansas City Title & Trust Co.,* 46 F. (2d) 928, but that case did not so hold, nor is it in conflict with the decision below.

In urging that the decision of the court below be affirmed, we do not argue that the *Crooks* case was incorrectly decided on the basis of the facts therein. Still less do we assert that a title abstract plant may never be the subject of a proper obsolescence deduction. The court below did not so hold, and we make no such claim. We contend only that the *Crooks* case does not support taxpayer's position that a deduction for obsolescence

may be occasioned by voluntary duplication, and that it is readily distinguishable in several crucial particulars from the case at bar.

In the *Crooks* case, the court allowed a deduction for obsolescence of certain abstract plants. It found that taxpayer purchased them "for the purpose of using them in its business" (p. 928). The court also found that it was thought (p. 929) that they "could be used to advantage in the abstract and title guaranty work of the taxpayer", and at least part of the records they contained were so used. The deduction was allowed, not on grounds of duplication, but because taxpayer established that the plants would become obsolete over the period 1921–1930 as a result of "new and modern methods" which "tended to supplant the methods employed" (p. 929). Since taxpayer there made no claim for obsolescence until the plants had been in its possession for six years, it is clear that duplication was not the basis of its claim. Rather, the plants in question were found upon trial to be inefficient, and new entries were discontinued for that reason. Thus, it is apparent that the *Crooks* case is authority only for this proposition: where an asset is bought for the purpose of use in the business, and is in fact so used, and subsequently is shown to be in process of becoming obsolete by reason of the development of improved methods, the cost of such asset may be deducted, *pro rata,* over the period of obsolesence established. Manifestly, the case cannot possibly be construed to hold that where taxpayer obtains an asset which, at the time of acquisition, is useless to him because it is a duplicate of one he already owns,

he may, in the year of acquisition, take an obsolescence deduction in the full amount of the value of the duplicate asset.

As is apparent from the foregoing, the *Crooks* case is readily distinguishable from the instant case in several significant particulars: (1) The taxpayer in the *Crooks* case purchased the abstract plants for the purpose of using them in its abstract and title guaranty business and in the belief that they could be used to advantage in such business. In the case at bar, on the other hand, the taxpayer knew, when it acquired the Land Title and Real Estate plants, that one of them was an unnecessary duplicate, useless in its business. This was admitted in taxpayer's report to the Pensylvania Department of Revenue (R. 29). And the testimony of taxpayer's title officer indicates clearly that it was known when the Land Title plant was acquired that it would not be useful in taxpayer's business. (R. 50.) Finally, there is the undisputed fact that the Land Title plant was stored in the basement during late October and early November, 1927, immediately upon the organization of the taxpayer corporation. (R. 57, 296.) (2) There was absolutely no showing, in the instant case, of any new or improved techniques that would render either plant obsolete, while in the *Crooks* case the court stated (p. 929) that "new and modern methods" had "tended to supplant the methods employed". (3) In the *Crooks* case new daily entries were discontinued because the plants were found upon trial to be inefficient, whereas the present taxpayer discontinued the daily entries only because

the Land Title plant was a superfluous duplicate. (4) Taxpayer in the *Crooks* case established a period of obsolescence from 1921 to 1930, and claimed the deduction *pro rata* over those years, while the instant taxpayer did not, although required to do so by Article 206 of Regulations 74. (5) No claim for obsolescence deduction was made in the *Crooks* case until the plants had been in taxpayer's possession for six years. The present taxpayer claimed a deduction for total obsolescence immediately.

We have found only one case in which an obsolescence deduction was claimed on account of property which taxpayer had no intention of using at the time of acquisition. In *Columbus Brick & Tile Co.* v. *Commissioner*, 26 B. T. A. 794, taxpayer purchased a brick and clay plant, which included certain burning and drying equipment in process of being dismantled because of obsolescence at the time of purchase. Taxpayer's claim for an obsolescence deduction on that equipment was denied because it knew, at the time of purchase, that the equipment would not be used.

Likewise, it has been held that a bad debt deduction is not allowable where the debt was worthless when acquired by the taxpayer. *Eckert* v. *Burnet*, 283 U. S. 140, 141; *Dexter* v. *Commissioner*, 99 F. (2d) 769, 773 (C. C. A. 1st); *Kinkead* v. *Commissioner*, 71 F. (2d) 522, 523 (C. C. A. 3d); *In re Park's Estate*, 58 F. (2d) 965, 967 (C. C. A. 2d), certiorari denied, 287 U. S. 645. Cf. *Voliva* v. *Commissioner*, 36 F. (2d) 212, 213 (C. C. A. 7th). And many analogous cases establish the general rule that no loss deduction is allowable where tax-

payer knowingly acquires property of no utility to it. Thus, where land upon which there is a building is purchased with the intention of demolishing, rather than using the building, no loss deduction may be taken for the value of the building. *Providence Journal Co.* v. *Broderick,* 104 F. (2d) 614 (C. C. A. 1st); *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703 (C. C. A. 3d); see *Union Bed & Spring Co.* v. *Commissioner,* 39 F. (2d) 383, 385 (C. C. A. 7th); cf. *Anahma Realty Corporation* v. *Commissioner,* 42 F. (2d) 128 (C. C. A. 2d), certiorari denied, 282 U. S. 854; *Young* v. *Commissioner,* 59 F. (2d) 691 (C. C. A. 9th), certiorari denied, 287 U. S. 652; *Spinks Realty Co.* v. *Burnet,* 62 F. (2d) 860 (App. D. C.), certiorari denied, 290 U. S. 636. Likewise, a taxpayer has been held not entitled to a loss deduction where he purchases and scraps a competitor's plant in order to eliminate competition. *Newspaper Printing Co.* v. *Commissioner,* 56 F. (2d) 125 (C. C. A. 3d).[4] Nor is taxpayer entitled to a loss deduction when he buys machinery for which, it develops, he has no use. *Flexible File Co.* v. *Commissioner,* 13 B. T. A. 909, affirmed, *per curiam,* 41 F. (2d) 997 (C. C. A. 6th). Similarly, the Treasury Department has ruled that the expenditure for land title abstract books "may not be deducted as a loss by reason of the purchaser's claim that they are of no service to it because it already owns

[4] The court below indicated, by its reference to the *Newspaper Printing Co.* case, that it believed the Land Title plant was acquired for the purpose of eliminating competition and that the deduction claimed might be disallowed for that reason. (R. 326.) This point is discussed *infra*, pp. 38–41.

another set of the same records." O. D. 1049, 5 Cum. Bull. 175 (1921).

By parity of reasoning, the taxpayer's claim for an obsolescence deduction should be denied since it voluntarily acquired duplicate plants, one of which it did not intend to use.

2. Moreover, taxpayer is not entitled to the deduction for obsolescence because it has failed to establish a period of obsolescence of a duration greater than one year at the end of which the property would be obsolete. As stated in *Tennessee Fibre Co.* v. *Commissioner*, 15 B. T. A. 133, 140, the statutory provision for obsolescence "is intended to care for losses of capital which take place *over a longer period than the taxable year.*" [Italics supplied.] And this Court has plainly indicated that the allowance for obsolescence, like the deduction on account of depreciation, is an *annual* allowance (*Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638, 645):

> The statute contemplates annual allowance for obsolescence just as it does for exhaustion, wear and tear. That is necessary in order to determine true gain or loss because postponement of deductions to cover obsolescence until the property involved became obsolete would distort annual income. It is well understood that exhaustion, wear, tear or obsolescence cannot be accurately measured as it progresses and undoubtedly it was for that reason that the statute authorized "reasonable" allowances to cover them in order equably to spread that element of operating expenses through the years. * * *

Accordingly, when an asset becomes worthless during the taxable year only, no deduction for obsolescence is allowable. *Zakon* v. *Commissioner*, 7 B. T. A. 687.

In *Olean Times-Herald Corporation* v. *Commissioner*, 37 B. T. A. 922, two newspapers, the Olean Times and the Olean Herald, each having its own printing plant, combined in 1932, and thereafter used the plant of the Times to the exclusion of the other. In the returns of the combined corporation for 1933 and 1934, obsolescence deductions were claimed. The Board said (at pp. 924-925):

> "Obsolescence as used in the statute is the state or process of becoming obsolete, and the provision allowing a deduction therefor is intended to care for losses of capital which take place over a longer period than the taxable year." *Tennessee Fibre Co.*, 15 B. T. A. 133; *William Zakon*, 7 B. T. A. 687. Thus, it is necessary for one claiming such a deduction to establish a period longer than the taxable year over which period the asset is becoming obsolete and at the end of which period it will be obsolete. * * *

It will be noted that the rule that obsolescence must be established over a period longer than the taxable year at the end of which the asset will be obsolete scrupulously follows the requirement of the regulations to the effect that obsolescence is allowable only when the taxpayer clearly shows that his property is being affected by economic conditions "that *will* result in its being abandoned *at a future date*". (Italics supplied.) Treasury Regulations 74, Article 206. See

I. T. 1775, II-2 Cum. Bull. 145 (1923); O. D. 381, 2 Cum. Bull. 138 (1920); Bureau of Internal Revenue Bulletin "F", January, 1931. Similarly, it gives effect to the definition of obsolescence as a "*process* by which units *gradually* cease to be useful * * * on account of changed conditions". (Italics supplied.) See *Burnet* v. *Niagara Brewing Co.,* 282 U. S. 648, 654. It also preserves the distinction between obsolescence and loss of useful value contemplated by Regulations 74 in Article 206 and Article 173. Article 173, relating to "loss of useful value", requires proof of some change in conditions whereby the usefulness of an asset is "suddenly terminated", and allows a loss deduction in the year in which such termination occurs. On the other hand, Article 206, dealing with obsolescence, requires a showing that the property will become useless at some future date, and contemplates deductions in the years prior to the year in which complete uselessness will result. *State Line & Sullivan R. Co.* v. *Phillips,* 98 F. (2d) 651 (C. C. A. 3d), certiorari denied, 305 U. S. 635.

Examination of the cases in which this Court has upheld a deduction under the obsolescence provision of the revenue act reveals that, with but one exception,[5] the taxpayer established the existence of a period of obsolescence of a duration greater than the taxable year, at

[5] In *United States Cartridge Co.* v. *United States,* 284 U. S. 511, a deduction for obsolescence of certain buildings was allowed in 1918, because of the Armistice, although no period of obsolescence had been established. Where, as in the *U. S. Cartridge* case, a total loss of useful value occurs in one taxable year, it is believed the regulations contemplate that a loss deduction, not an obsolescence deduction, will be allowed. Regulations 74, Article 173. See

the end of which it was reasonable to believe that property would be completely obsolete. Thus, in *Gambrinus Brewing Co.* v. *Anderson*, 282 U. S. 638, this Court stated (at p. 640):

> January 31, 1918, it had become common knowledge and was known to plaintiff that prohibition would become effective and that as a result plaintiff and others engaged in that business would suffer obsolescence in the value of their capital assets. Prohibition did become effective January 16, 1920. * * * As a result of prohibition and beginning January 31, 1918, and ending January 16, 1920, plaintiff suffered obsolescence of such buildings equal to such depreciated cost which should be ratably apportioned over that period. * * *

In *Burnet* v. *Industrial Alcohol Co.*, 282 U. S. 646, where an obsolescence deduction was allowed on authority of the *Gambrinus* case, this Court observed that the Board of Tax Appeals found that the period of obsolescence over which the deduction could be taken was from December 18, 1917, to January 16, 1920. Likewise, in *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, it was said (at p. 656):

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discussion, *infra*, pp. 21–22. In any event this Court was not called upon to decide the question of whether, where useful value is suddenly and completely terminated, the proper deduction is to be taken under the loss provision of the statute, or under the obsolescence provision. The Government argued only that no obsolescence deduction should be allowed because, by Section 234 (a) (8) of the Revenue Act of 1918, amortization of war production facilities was authorized. This Court held only that the amortization provision did not exclude an obsolescence allowance.

> The facts found clearly show that obsolescence commenced about the beginning of 1918 and that the property became obsolete upon the taking effect of prohibition in January, 1920. * * *

Similarly, in the case on which taxpayer places principal reliance, *Crooks* v. *Kansas City Title & Trust Co.*, 46 F. (2d) 928 (C. C. A. 8th), as pointed out by the court therein, the taxpayer complied exactly with the requirement of the Regulations and Treasury rulings by establishing that the four abstract plants on which the obsolescence deduction was claimed would become obsolete over the period 1921–1930, and would be useless by that latter date.

Taxpayer cites, and quotes at considerable length from the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Wagner Electric Mfg. Co.*, 61 F. (2d) 204. (Br. 19–21.) That case, it is argued, establishes that an obsolescence deduction need not be based on a process of obsolescence going on over any period of time, but may be allowed where an asset becomes obsolete "over night". (Br. 22.) However, that case merely held that, as a result of the Armistice, a *portion* of the value of machinery and equipment used in the manufacture of shells constituted a proper deduction in 1918 on account of obsolescence, and that the remainder should be deducted in 1919. Moreover, the court was not confronted with, and did not undertake to decide, the question of whether the proper deduction for the destruction of the utility of the shell manufacturing plant by the Armistice was a deduction for abandonment under the loss provision

of the statute or an obsolescence deduction. The Government argued only that the method used by the lower court in determining the amount of obsolescence attributable to the year 1918 was improper, and the court itself stated that (p. 205) "The only question presented is: How much, if any, of the admitted loss of $175,-866.49 should be attributed to the year 1918?" Accordingly, the *Wagner Electric* case may scarcely be regarded as an authority for the proposition that it is unnecessary, when claiming a deduction under the obsolescence provision of the revenue act, to establish a period of obsolescence extending over a time longer than the taxable year.

The contention here made that a deduction for obsolescence may not be granted unless it be shown that the process of obsolescence extends over a period greater than the taxable year does not require us to contend that in a case where the loss of useful value takes place due to obsolescence entirely within the taxable year the taxpayer is thereby denied the possibility of any deduction. In such a case, the taxpayer is entitled to a deduction, but the deduction should be claimed for the loss of useful value under the loss provisions of the statute, not under the obsolescence provision. O. D. 753, 3 Cum. Bull. 171 (1920); *Zakon* v. *Commisisoner,* 7 B. T. A. 687. See Regulations 74, Articles 173, 206. Thus, in 2 Paul and Mertens, *Law of Federal Income Taxation* (1934), § 20.111, it is said (p. 659):

> Extraordinary obsolescence where the usefulness of an asset is suddenly terminated is ordi-

> narily allowed for under the loss provisions of the statute, the loss being deductible in its entirety in the year in which it occurs. * * *

See also *id.*, p. 662, Section 20.114.

Although the same type of circumstance, such as prohibitory legislation or a new invention, may give rise to either deduction, depending on the celerity with which it is effective in terminating useful value, the loss deduction, granted under a different statutory provision, is entirely separate and different from the obsolescence deduction, and a claim for one will not support the other deduction. *Olean Times-Herald Corporation* v. *Commissioner,* 37 B. T. A. 922; *Alliance Milling Co.* v. *Commissioner,* 10 B. T. A. 457; cf. *Best Brewery Co.* v. *Commissioner,* 16 B. T. A. 1354; see *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) [illegible], 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *Kaltenbach* v. *United States,* 66 C. Cls. 581, 588. The question of whether the taxpayer is here entitled to a deduction under the loss provision of the statute will be considered in Point III, *infra.*

B. THE LAND TITLE PLANT DID NOT IN FACT BECOME OBSOLETE DURING THE TAXABLE YEAR

In Point I A, *supra,* we sought to establish that the claimed deduction for obsolescence was correctly denied, as a matter of law, by the court below. We now make the further contention that, even if a deduction for obsolescence might under some circumstances be allowable in a case of this character, nevertheless, no deduction is allowable here, for, as stated by the court

below, the Land Title plant did not in fact become obsolete during the taxable year.

The Land Title plant was originally installed by the Land Title and Trust Company, one of the combining companies, as far back as 1886–1887. (R. 24.) The records therein "went all the way back to William Penn, the original grant" (R. 32), and had been kept scrupulously up to date by the expenditure of very large sums (R. 23) for the purpose of making notations in the plant's files of all transactions pertaining to real estate titles in Philadelphia from 1886 until October, 1927 (R. 288). In view of these facts, it is patently absurd for taxpayer to maintain that the plant became obsolete and worthless, except for salvage value, merely because current recordings were discontinued during one year, the taxable period November 1, 1927, to October 31, 1928. As the court below trenchantly stated (R. 325):

> To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view. * * *

Taxpayer's claim that the Land Title plant, which it carried on its books at $800,000, became worthless, ex-

cept for salvage value, because of obsolescence during the taxable year is seen to be little short of fantastic in view of the fact that taxpayer set a price upon it to a prospective purchaser, several months after the beginning of the taxable year, of $1,000,000. (R. 33–34, 41, 297.) Moreover, its goodwill was said to be "very substantial". (R. 96–97.) It should be noted also that for purposes of the merger the Land Title plant was valued at $800,000, the same amount at which the Real Estate title plant was valued. This amount was $525,000 more than the value at which the Land Title plant had been carried immediately prior to the merger. (R. 22.) In its report to the Commonwealth of Pennsylvania for the two-month period from its organization on November 1, 1927, to December 31, 1927, taxpayer listed among its assets "Title Plant", valued at $1,600,000, which item consisted of the Land Title plant and the Real Estate title plant, each carried on its books at $800,000. (R. 22.) In its reports for the calendar years 1928, 1929, and 1930, the value assigned to the item "Title Plant" was reduced by $50,000 each year. (R. 27.) The high value placed upon the Land Title plant on the taxpayer's books, and the annual reductions thereof, presumably for depreciation, are hardly consistent with its contention that the Land Title plant became totally obsolete and valueless, except for salvage, in the taxable year 1928. In the year in which an asset becomes totally obsolete, its value is not enhanced by $525,000, nor is the value of a totally obsolete asset subject to further depreciation. See *Lattimore* v. *United States*, 12 F. Supp. 895, 910 (C. Cls.).

Further, the Annual Operating Statement of the Land Title and Trust Company for its fiscal year ending September 30, 1927 (R. 262–263) discloses total expenditures on account of the Land Title plant amounting to $167,821.82, of which only $12,142.72 was spent on searches. Other items included rent, $18,650.04, salaries, $114,904.37, and stationery, $22,124.69. Apparently a substantial part of these expenditures must have been incurred in operating the plant, not merely in keeping it up to date, although no precise breakdown is possible on the basis of the data in the operating statement. Even assuming, as could not possibly have been the case, that the entire amount expended during the fiscal year ended September 30, 1927, $167,821.82, was spent for the sole purpose of keeping the plant up to date during that fiscal period, the expenditure necessary to keep the same plant up to date for a similar period, the taxable year November 1, 1927, to October 31, 1928, would scarcely have been greater than $167,821.82. It thus appears that during the taxable year, by an expenditure of such a sum, the plant could have been kept up to date. We submit that an asset of an alleged value of over $1,000,000 could not have become totally obsolete and worthless, except for salvage value, merely because of the failure to spend $167,821.82, or some part thereof, on keeping it up to date during the taxable year. It would seem that, even at the end of the taxable year, by an expenditure of such an amount, taxpayer could have restored the Land Title plant to a perfectly up to date condition. Indeed, it would have cost taxpayer considerably less, since tax-

payer would merely have had to copy the entries from the up to date Real Estate Title plant. (R. 106, 121.)

The conclusion is therefore inescapable that the Land Title plant did not in fact become obsolete during the taxable year. Nevertheless, the District Court determined that the Land Title plant "was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927 and ending October 31, 1928 and became obsolete on or before October 31, 1928." (R. 297.) Taxpayer argues that the District Court's findings are conclusive (Br. 33–38). But whether denominated a finding of fact or conclusion of law, the District court's determination was actually a ruling on a mixed question of law and fact which may be reviewed on appeal. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491; *Bogardus* v. *Commissioner*, 302 U. S. 34, 39. And it is even further established that where the record contains the evidence and reveals that an ultimate finding of fact is clearly erroneous, unsupported by any evidence, the appellate court is not bound thereby, but may disregard the finding and reverse the judgment. *United States* v. *Clark*, 96 U. S. 37; *First National Bank of Chicago* v. *United States*, 102 F. (2d) 907 (C. C. A. 7th); *Conners* v. *United States*, 141 Fed. 16 (C. C. A. 1st). See *Collier* v. *United States*, 173 U. S. 79, 81; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232; *United States* v. *Union Trust Co. of Indianapolis*, 90 F. (2d) 702, 703 (C. C. A. 7th).

In the instant case, there is nothing in the entire record to support the ultimate conclusion that the plant "became obsolete on or before October 31, 1928". (R. 297.) Even assuming that such finding involved

purely a question of fact, it is not conclusive. The only evidence of record probative in any way of obsolescence is the testimony that no new entries were made after October, 1927. (R. 50, 422.) But that evidence is assuredly no support for the ultimate finding of total obsolescence on or before October 31, 1928, particularly in the light of all the other evidence as to the completeness of the plant's records, the heavy investment in the plant, the relatively small cost of keeping it up to date for one year, its valuation by taxpayer for purposes of the merger at $800,000 on November 1, 1927, the price of $1,000,000 set upon it in 1928, the continuing high valuation in subsequent years, and the deductions for depreciation in subsequent years' reports to the Commonwealth of Pennsylvania. Accordingly, the finding of the District Court is not conclusive, and the holding of the court below may be upheld on the ground that the Land Title plant did not in fact become obsolete during the taxable year.

II

ASSUMING, ARGUENDO, THAT TAXPAYER IS OTHERWISE ENTITLED TO A DEDUCTION FOR OBSOLESCENCE, THE ALLOWANCE IS PRECLUDED BECAUSE THE PROPERTY WAS NOT "USED" IN THE TRADE OR BUSINESS AS REQUIRED BY SECTION 23 (K) OF THE REVENUE ACT OF 1928

By the express and unambiguous language of Section 23 (k) of the Revenue Act of 1928, the allowance for exhaustion and wear and tear, including obsolescence, is limited to "property *used* in the trade or business" (italics supplied). It is beyond question that unless the property is so used, no deduction for obsolescence in any amount may be had. *Kansas City Southern Ry. Co.*

v. *Commissioner,* 52 F. (2d) 372 (C. C. A. 8th), certiorari denied, 284 U. S. 676; *Buck* v. *Commissioner,* 83 F. (2d) 627 (C. C. A. 9th); *Jewett & Co.* v. *Commissioner,* 61 F. (2d) 471 (C. C. A. 2d); *Des Moines Title Co.* v. *Commissioner,* 39 B. T. A. 729.[6] In *Buckwalter* v. *Commissioner,* 61 F. (2d) 571 (C. C. A. 6th), it was held that no deduction is allowable for the exhaustion of unexploited patents owned by a corporate officer who refrained from prosecuting infringers because they were customers of his employer. Such property, the court held, was not "used in the trade or business", assuming that the taxpayer was engaged in a trade or business, even though the taxpayer's failure to enforce his rights under the patent may have redounded to his financial benefit by placing him in better grace with his employer.

In the opinion below, the Circuit Court of Appeals intimated that it believed the taxpayer had not complied with the statutory condition precedent of use in the trade or business (R. 321–322), but it did not rest its decision on that ground. We now contend that the Circuit Court of Appeals would have been entirely justified in denying the deduction on the ground that the stored plant was never used in the taxpayer's business within the meaning of the statute, for its use had ceased prior to the merger creating the taxpayer corporation.

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[6] There is nothing contrary to the above cases in *Kittredge* v. *Commissioner,* 88 F. (2d) 632 (C. C. A. 2d), which merely held that the deduction may be had for business property, though temporarily idle, if still "devoted to the trade or business" and not withdrawn from business purposes.

The evidence relating to the issue of use of the Land Title plant is summarized by the District Court as follows (R. 288):

> In October and continuing through part of November, 1927, the Land Title plant was removed from the former offices and *stored* at 517 Chestnut Street where it has remained to the present time. It was used at first in connection with title matters then pending, especially those relating to properties *to be sold* at the Sheriff's sale of *November*, 1927, and subsequently only on infrequent occasions as a reference to avoid the necessity of inspecting the public records. The plant was never continued by the addition of current recordings, * * *. [Italics supplied.]

As correctly pointed out by the Circuit Court of Appeals, "There is no evidence * * * to show that the plant was used in connection with new searches of properties after October 31, 1927." (R. 321.) The merger creating the taxpayer corporation did not take place until October 31, 1927, and taxpayer did not open for business until November 1, 1927. (R. 21–22.) The testimony of taxpayer's title officer, as observed by the Circuit Court of Appeals, is highly significant, for it reveals that the Land Title plant was not used during taxpayer's existence. As title officer, he presumably would have more knowledge of the use made of the title plant than any of the other officers. He testified (R. 56–57):

> Q. When were the records put down there?
>
> A. The records were taken down there sometime between the second week in October and the

end, I think, of the first week in November, or perhaps a little later.

Q. Of what year?

A. Of 1927.

Q. And what hapened to them after they were put there? Were they used or not?

A. The only use made of them *in October*, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the *forthcoming Sheriff sales of November*, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. *And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation*, what references may have been made from time to time to that plant. (Tr. 66.)

Q. You do know that they looked up some things from time to time?

A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall. [Italics supplied.]

Similarly, taxpayer's president testified that (R. 32):

> The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of *the coming month, the month of November*, and I think December, although I can't say definitely on that. * * * [Italics supplied.]

It will be noted that both witnesses referred to the month of November as being in the future. Thus it is evident that even the slight use referred to in connection with the sheriff's sales took place in October, 1927, prior to the merger creating the taxpayer, on October 31, 1927, and prior to its opening for business on November 1, 1927. (R. 21–22.) The record is absolutely devoid of any indication that the Land Title plant was used during the taxpayer's existence other than the title officer's mere "belief" that "very occasionally" there was some incidental reference to the records in the Land Title plant in order to avoid the slight inconvenience of a visit to the City Hall.

Moreover, in taxpayer's report to the Pennsylvania Department of Revenue it is stated that (R. 29): "These Title Plants being duplicates, *one of them was of no further use, and was immediately discarded* * * * ." [Italics supplied.] Indeed, while interrogating taxpayer's witness with a view to establishing obsolescence during the taxable year, taxpayer's own counsel unwittingly made the damaging admission that the plant was taken out of use prior to the creation of the taxpayer corporation when he asked this question (R. 77):

> Q. Let me ask you to say what the difference was in the plant *after it had been taken out of use in October, 1927, and stored in the basement*, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928? [Italics supplied.]

The witness' reply seems to indicate that the plant was taken out of use by October 31, 1927. (R. 78).

Thus, the evidence necessitates the conclusion that the property was stored and its use in the business terminated prior to the organization of the taxpayer. In any event, however, there is absolutely no evidence of record any more favorable to the taxpayer than a "belief" that the Land Title plant was "very occasionally" and incidentally referred to, as a "check-up", in order "to save a visit to City Hall". (R. 57.) As stated by the Circuit Court of Appeals "that use at most was very slight". (R. 322.)

Notwithstanding the evidence set out above, and its own findings that daily entries ceased in October, 1927 (R. 296), and that the plant was put in storage in late October and early November, 1927 (R. 296), the District Court, in its findings of fact, included the following (R. 296): "The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927". However, no finding is made as to the extent or character of such use. If the finding as to use be considered a reference to the negligible and incidental use of the plant, as a slight convenience, indicated by the foregoing testimony, we do not challenge its validity, but assert that the District Court erred as a matter of law in holding that such negligible use constitutes a sufficient satisfaction of the statutory requirement of "use in the trade or business". If, on the other hand, the finding be interpreted to mean that the plant was used in taxpayer's business in any real or substantial sense, then we assert the finding is a nullity, wholly devoid of support in the record, contrary

to all the facts and inconsistent with the court's own findings that the plant was stored in the basement in the latter part of October and early November, 1927, and that daily entries therein were discontinued in October, 1927.

III

TAXPAYER IS NOT ENTITLED TO ANY DEDUCTION UNDER SECTION 23 (F) OF THE REVENUE ACT OF 1928 ON THE GROUND OF ABANDONMENT OF A CAPITAL ASSET

Taxpayer contends that it is "clearly entitled to a deduction on the theory of abandonment as well as on the theory of obsolescence". (Br. 38–48.) As the taxpayer apparently recognizes (Br. 12), its "abandonment" claim, if allowable at all, must be based on the entirely different statutory provisions in Section 23 (f), granting a deduction for *losses*. Yet it will be shown that taxpayer is not entitled to a loss deduction because of abandonment for the following reasons: (1) the evidence reveals that the asset in question was neither abandoned nor otherwise disposed of, nor did it become worthless, during the taxable year; (2) it was known when the property was acquired that it was a duplicate and would not be useful in taxpayer's business; (3) it was acquired to eliminate competition; (4) taxpayer's claim for refund is inadequate to support such a claim.

(1) Manifestly, to obtain the claimed abandonment deduction, abandonment must be proved. *Terre Haute Electric Co.* v. *Commissioner*, 96 F. (2d) 383 (C. C. A. 7th). This follows from the established requirement that a loss, to be deductible, must be fixed by some

identifiable event, such as a sale or other disposition, or some occurrence indicating a closed transaction. *United States* v. *White Dental Co.*, 274 U. S. 398; *United States* v. *Hardy*, 74 F. (2d) 841 (C. C. A. 4th). While abandonment necessarily involves non-use, mere non-use obviously does not constitute abandonment. *Ewald Iron Co.* v. *Commissioner*, 37 B. T. A. 798; *Zumwalt* v. *Commissioner*, 25 B. T. A. 566. Neither does the fact that, in addition to non-use, the asset in question was dismantled or stored, or both. *Ewald Iron Co.* v. *Commissioner, supra*; *Flexible File Co.* v. *Commissioner*, 13 B. T. A. 909, affirmed, *per curiam*, 41 F. (2d) 597 (C. C. A. 6th).

Whether there has been an abandonment has been said to depend on the intention of the taxpayer, coupled with an act of abandonment, both to be determined from the surrounding facts and circumstances. *Belridge Oil Co.* v. *Commissioner*, 11 B. T. A. 127; *Reuben H. Donnelley Corporation* v. *Commissioner*, 26 B. T. A. 107; *Zumwalt* v. *Commissioner, supra*; *Ewald Iron Co.* v. *Commissioner, supra*.

Applying the foregoing principles to the case at bar, it is apparent that taxpayer has failed to show abandonment of the Land Title plant. Taxpayer stored, but did not scrap the plant. The place of storage was a dry, heated, illuminated basement, where the plant was not subject to any physical deterioration (R. 107, 108), and the records stored there were kept fully intact and available for use (R. 59, 69). Taxpayer's president testified that in the Spring of 1928, after it had been in storage for approximately half the taxable

year, he quoted a price on it to a prospective purchaser of $1,000,000. (R. 33.) He further testified that the possession of such a plant was a distinct advantage to any company in the title insurance business because a company owning such a plant would be "better prepared to command the business than otherwise * * *." (R. 36.) The taxpayer's title officer characterized the Land Title plant as "complete" and "admirable" (R. 50), with records going back further than any other plant in the city, including the Real Estate plant (R. 60–61), and taxpayer's president testified that it was "a more complete plant than any other plant in the City; it had a background which went all the way back to William Penn, the original grant" (R. 32). Moreover, even the District Court found that the Land Title plant had a value of $125,000 at the end of the taxable year. (R. 298.) On these facts, it is no less than preposterous for taxpayer to claim that it abandoned the plant. The most that can be said is that taxpayer stored the plant because it was surplus equipment, and for that reason ceased making the daily entries necessary to keep it up to date. As pointed out by the Circuit Court of Appeals (R. 323), at any time during the taxable year, at an expense not incommensurate with the value placed upon it, taxpayer could have restored the Land Title plant to perfect operating condition.[7]

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[7] In this connection it may be noted that taxpayer's title officer and an expert witness for the Government each testified that the cost of bringing one plant up to date is much less where its owner has another plant which has been kept up to date, from which the entries can be copied, than would otherwise be the case. (R. 106, 121.) See *supra*, pp. 25–26; for discussion of necessary expenditure.

Clearly, the Land Title plant was not discarded and it had substantial value at the end of the taxable year. Under these circumstances, it is submitted that taxpayer has failed to establish abandonment, the ground on which the loss deduction must be claimed. Since the taxpayer has failed to sustain its burden of proof the deduction should be disallowed. *Burnet* v. *Houston,* 283 U. S. 223; *United States* v. *Anderson,* 269 U. S. 422.

(2) Furthermore, taxpayer is not entitled to the deduction because, at the time of acquisition, taxpayer knew that the Land Title plant would not be useful in its business since it was a duplicate of taxpayer's other plant. (R. 35.) This was admitted in taxpayer's report to the Pennsylvania Department of Revenue (R. 43), and may be inferred from testimony of the expert witness for the United States to the effect that where one company acquires two complete title abstract plants it will certainly be feasible to use only one of them (R. 170–171, 177). The fact that it was the Land Title plant, not the Real Estate Title plant which it was intended at the time of acquisition not to use is indicated by testimony of taxpayer's title officer that, at the time of the merger in October, 1927, he and taxpayer's vice president, who were jointly entrusted with the task of determining which plant should be used, "had been convinced for some time that the Land Title plant * * * was a very expensive and uneconomical plant to keep up and maintain". (R. 50.) Moreover, the same officer testified that the decision to use the Real Estate Title plant and store the Land

Title plant was reached "after perhaps an hour and a half or two hours' visit to the plant". (R. 50.) The foregoing circumstances, considered in conjunction with the fact that the Land Title plant was stored in October and early November, 1927 (R. 57, 296), renders inescapable the conclusion that at the time the Land Title plant was acquired it was not intended to be used.

The principle is firmly established that no loss deduction on grounds of abandonment of a capital asset is permissible where, at the time the property was acquired, there was no intention to use it. Thus, "when a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building". Regulations 74, Article 172;[8] *Providence Journal Co.* v. *Broderick*, 104 F. (2d) 614 (C. C. A. 1st); *Liberty Baking Co.* v. *Heiner*, 37 F. (2d) 703 (C. C. A. 3d); cf. *Anahma Realty Corp.* v. *Commissioner*, 42 F. (2d) 128 (C. C. A. 2d), certiorari denied, 282 U. S. 854; *Young* v. *Commissioner*, 59 F. (2d) 691 (C. C. A. 9th), certiorari denied, 287 U. S. 652; *Spinks Realty Co.* v. *Burnet*, 62 F. (2d) 860 (App. D. C.), certiorari denied, 290 U. S. 636. See also *Union Bed & Spring Co.* v. *Commissioner*, 39 F. (2d) 383, 385 (C. C. A. 7th). The intention of the taxpayer as to use at the time of purchase is the test of

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[8] The identical provision appears in Article 142 of Regulations 45, 62, 65 and 69, and has been retained in regulations pursuant to subsequent revenue acts in Article 172 of Regulations 77, and Article 23 (e) 2 of Regulations 86, 94 and 101.

whether the loss deduction is allowable. *Providence Journal Co.* v. *Broderick, supra; Union Bed & Spring Co.* v. *Commissioner, supra;* cf. *Hotel McAllister* v. *United States,* 3 F. Supp. 533 (S. D. Fla.). Applying the principle underlying the foregoing authorities to the instant case, taxpayer's intention not to use the Land Title plant bars any claim for a loss deduction on ground of abandonment.

(3) Where a taxpayer acquires property in order to eliminate competition, the transaction does not give rise, on disposition of the property thus acquired, to a deductible loss, for the value of the thing procured, the elimination of competition, is a capital asset. *Newspaper Printing Co.* v. *Commissioner,* 56 F. (2d) 125 (C. C. A. 3d).[9] See also *Putnam Trust Co.* v. *Commissioner,* 26 B. T. A. 655. Similarly, it has repeatedly been held that expenses for the purpose of eliminating

[9] In *Sanitary Co. of America* v. *Commissioner,* 34 F. (2d) 439 (C. C. A. 3d), cited by taxpayer (Br. 13), a loss deduction was allowed when taxpayer purchased and scrapped the plant of a competitor. However, the only question argued or considered by the court was whether the taxpayer's mode of ascertaining its loss was proper. No objection appears to have been made to the claimed deduction on the ground that the purpose of the purchase was the elimination of competition, either before the Court of Appeals or in the Board of Tax Appeals, where the deduction was disallowed solely on the ground of insufficient evidence as to cost. 10 B. T. A. 944. Accordingly, the case is hardly authority for the proposition that a deductible loss is sustained where a plant is purchased and scrapped for the purpose of eliminating competition. Apparently the very court which decided it did not consider it to be such, for it is not even mentioned in that court's subsequent opinions in the *Newspaper Printing* and *Clark Thread* cases, *supra;* or in the instant case, in which the court cites with approval the *Newspaper Printing* case (R. 326).

competition constitute capital expenditures, and are not deductible as ordinary and necessary business expense, since a capital asset is acquired. *Clark Thread Co.* v. *Commissioner,* 100 F. (2d) 257 (C. C. A. 3d); *Houston Natural Gas Corp.* v. *Commissioner,* 90 F. (2d) 814 (C. C. A. 4th); *Public Opinion Pub. Co.* v. *Jensen,* 76 F. (2d) 494 (C. C. A. 8th); *Eagle Pass & Piedras Negras Bridge Co.* v. *Commissioner,* 23 B. T. A. 1338; *News Leader Co.* v. *Commissioner,* 18 B. T. A. 1212; *Record Abstract Co.* v. *Commissioner,* 2 B. T. A. 628.[10]

Although the Circuit Court of Appeals in the present case held that taxpayer could not claim the deduction on the ground of abandonment because it did not assert such ground in its refund claim, the court went on to say that "the circumstances of the case at bar seem to us to be closely analogous to those presented in *Newspaper Printing Co.* v. *Commissioner,* 56 F. (2d) 125, decided by this court". (R. 326.) In that case the court denied a loss deduction upon the disposition of certain assets because it affirmatively appeared that the purpose of the purchase of such assets was the elimina-

[10] The *Record Abstract* case, it may be noted, involved a situation in which an abstract company obtained the abstract books of a competitor, for the purpose of eliminating competition. The cost of the acquisition was held a capital expenditure. Indeed, in the very case upon which taxpayer places principal reliance, *Crooks* v. *Kansas City Title & Trust Co.*, 46 F. (2d) 928, 929 (C. C. A. 8th), the court declared that taxpayer would not be entitled to any deduction for obsolescence on the four abstract plants in question if it appeared that its motive in acquiring these plants was the elimination of competition, but the court pointed out that the trial court had there held that such was not the case.

tion of competition. In other words, therefore, the Circuit Court of Appeals in the present case was of the opinion that the motivating force in the merger which resulted in the formation of the taxpayer corporation and its acquisition of two duplicate abstract plants was the desire to eliminate competition.

In the light of the evidence, such purpose, or something very closely analogous to it, must be imputed to taxpayer. As a result of the merger, taxpayer acquired the two most complete of the three principal abstract plants in Philadelphia (R. 35, 80), although only one of them could economically be used (R. 29, 118–119, 124). The parties to merger knew, at and before the time of the merger, that both plants were "designed and used for the same general purpose". (R. 22–23.) Ownership of a complete abstract plant is an invaluable aid in "commanding the business" of title insurance, according to the testimony of taxpayer's president (R. 36), and is a source of great prestige in the business (R. 119). Certain important customers, such as large mortgage and insurance companies, would not give their title insurance business to a company which did not own an abstract plant. (R. 36, 119.) Finally, attention is respectfully invited to the wholly uncontroverted and unimpeached testimony of the expert witness for the United States to the effect that it would be highly advantageous "to shut out competition among the so-called plant companies" and that "the suppression of one of the existing plants in the City would be a financial benefit to the other companies owning plants at that time". (R. 119–120.) Accordingly,

no deduction, whether for obsolescence or for abandonment, is permissible.

(4) Moreover, there is considerable doubt as to whether the "abandonment" issue may even be raised. The Circuit Court of Appeals held that the taxpayer could not claim a loss deduction on grounds of abandonment, stating that the claim for refund was based "solely upon the ground of obsolescence". (R. 326.) The accuracy of that statement is fully substantiated by the refund claim itself. (R. 8–12.) Taxpayer does not deny that its refund claim was based solely on obsolescence. Indeed, in its petition, taxpayer avers that it filed its claim for refund "alleging as the basis of its claim that it was entitled to a loss due to obsolescence of the title insurance plant * * *". (R. 6.) The refund claim was never amended.

Where a suit to recover taxes erroneously paid is based upon the rejection of a refund or credit claimed, it must rest upon the ground stated in the claim as originally filed, or as properly amended. It has repeatedly been held that recovery upon some ground other than that specified in the refund claim is not permissible. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269; *Lucky Tiger-Combination Gold Mining Co.* v. *Crooks*, 95 F. (2d) 885 (C. C. A. 8th); *Continental-Illinois Nat. Bank & Trust Co.* v. *United States*, 67 F. (2d) 153 (C. C. A. 7th), certiorari denied, 291 U. S. 663; *Ferguson* v. *United States*, 2 F. Supp. 1012 (C. Cls.), certiorari denied, 290 U. S. 694; cf. *Duffin* v. *Lucas*, 55 F. (2d) 786 (C. C. A. 6th), certiorari denied, 287 U. S. 611. And in *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d)

626, 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763, and *Kaltenbach* v. *United States,* 66 C. Cls. 581, 588, it was held that where the claim for refund is based on obsolescence, taxpayer may not urge that it is entitled to a deduction under the loss provision of the statute.[15]

Under the foregoing decisions, a taxpayer may not recover on the basis of a loss deduction when, as is here concededly the case, in its claim for refund it sought only a deduction on grounds of obsolescence. Taxpayer, however, argues that the question of abandonment was submitted to the Commissioner, although not presented in the refund claim. (Br. 40.) This argument is based on the fact that the letter from the Deputy Commissioner advising that the claim would be rejected states "Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned". (R. 13.) Taxpayer emphasizes the use of the word "abandoned" and urges that this letter proves that the question of abandonment was submitted to the Commissioner. Two answers may be made to this contention. First, on the question of what was submitted to the Commissioner, resort must manifestly be had to the document submitting the claim, the refund claim itself, which, taxpayer does not deny, was based

[15] The analogous question of whether a claim for refund may be amended, after expiration of the period of limitation, so as to claim the refund on another ground, was recently considered by this Court in *United States* v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. These cases establish the rule that such amendment of a previously filed refund claim may not be made when the amendments state a ground different from that stated in the original claim.

solely on obsolescence. Second, even though the Deputy Commissioner's letter may indicate what was actually considered by the Bureau, it does not support taxpayer's position that the Bureau considered two grounds of deduction, obsolescence and abandonment. For, when the passage relied upon is read in its context (R. 13), it indicates that the Bureau considered the matter as involving only one question, that of obsolescence, and that it regarded the abandonment as merely implementing that claim, not as giving rise to a separate question under a different statutory provision.[12] Indeed, petitioner fails to quote the entire sentence upon which it relies (Br. 40), and which, in full, reads as follows (R. 13):

> Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned; that the plant had a value of $1,250,000.00, and, therefore, a loss *on account of obsolescence* should be allowed in this amount. [Italics supplied.]

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[12] The petition (R. 2–8) presented the case to the District Court on the sole ground that taxpayer was entitled to a deduction for obsolescence under Section 23 (k) of the Revenue Act of 1928, and the trial court's statement of the question presented to it appears to be limited to a deduction for obsolescence (R. 289). Accordingly, the new issue of a loss deduction under Section 23 (k) on the ground of abandonment of a capital asset could not be raised on appeal. *General Utilities Co.* v. *Helvering*, 296 U. S. 200; *Helvering* v. *Salvage*, 297 U. S. 106. Cf. *Tricou* v. *Helvering*, 68 F. (2d) 280 (C. C. A. 9th), certiorari denied, 292 U. S. 655, rehearing denied, 293 U. S. 629; *Botchford* v. *Commissioner*, 81 F. (2d) 914 (C. C. A. 9th). See also *Duignan* v. *United States*, 274 U. S. 195; *Kottemann* v. *Commissioner*, 81 F. (2d) 621 (C. C. A. 9th).

IV

EVEN IF TAXPAYER IS ENTITLED TO SOME DEDUCTION, THE AMOUNT ALLOWED BY THE DISTRICT COURT IS EXCESSIVE

1. The complete Land Title plant consisted of two distinct parts: (1) the title search plant, consisting of the full set of records relating to real estate titles, and (2) the separate applications, abstracts, and opinions in each matter for which the company issued its title insurance policy. (R. 40, 49, 61.) As only the first part of the search plant allegedly became obsolete and was allegedly abandoned, it is clear that the March 1, 1913 value of the entire plant must be apportioned as between its two constituent parts, and only the value appertaining to the search plant, less its salvage value, may be deducted. It is not clear that the petitioner's witnesses or the District Court itself excluded the value of (2) in arriving at the March 1, 1913 value (R. 79, 83, 93, 100–103, 297–298).

2. Moreover, the District Court erred in finding the March 1, 1913 value to be $1,000,000. (R. 297.) It is stipulated that immediately prior to the merger in 1927 the Land Title plant was carried on the books of the Land Title and Trust Company, its then owner, at only $275,000 (R. 22), at which figure it was valued from September 30, 1897 (R. 23). Also, on its federal capital stock tax returns for the years 1917 to 1926, inclusive, the Land Title and Trust Company returned the book value and fair value of the Land Title plant at $275,000. (R. 24.) Even for purposes of the merger,

the Land Title plant was valued at only $800,000. (R. 22.) It was originally acquired, during the years 1886 and 1887 at a cost of $251,509.84. Expenses on additions to and maintenance of the plant during the years 1888, 1889 and 1890 amounted to $24,541.78, and from 1890 to February 28, 1913, the sum of $317,645.36 was spent on the plant. (R. 23.) These facts do not justify a finding that the March 1, 1913 value was $1,000,000. The only evidence in the record in any way probative of a March 1, 1913 value of $1,000,000 is the opinion evidence given by interested witnesses (R. 75, 83, 102), without adequate supporting facts. Such evidence is not conclusive. See *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 299–300, and authority there cited. It may be disregarded in favor of admitted facts. *Balaban & Katz Corp.* v. *Commissioner,* 30 F. (2d) 807, 808 (C. C. A. 7th); *State Line & Sullivan R. Co.* v. *Phillips,* 98 F. (2d) 651 (C. C. A. 3d), certiorari denied, 305 U. S. 635. Since the finding of a March 1, 1913 value of $1,000,000 is based solely upon opinion evidence of interested witnesses, and is inconsistent with the stipulated facts set out *supra,* all of which indicate a much lower value, we submit that the District Court's finding is erroneous and should be disregarded.

3. The District Court also erred in another respect. Testimony as to the value of the Land Title plant included the element of good will, which was said to be "very valuable" and "very substantial", although the witness was unable to estimate its value more precisely.

(R. 83–85, 97.) But no deduction may be taken for the obsolescence of good will. See *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, as explained in *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638, 641–642. See also *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *Kaltenbach* v. *United States*, 66 C. Cls. 581; *Moise* v. *Burnet*, 52 F. (2d) 1071 (C. C. A. 9th). In accordance with these decisions, Treasury Regulations 74, Article 203, expressly provide that "No deduction for depreciation, including obsolescence, is allowable in respect of good will." Hence, the District Court erred in not excluding from the value of the Land Title plant such part thereof as was attributable to its "very substantial" good will.[13]

Finally, it would seem that good will is something which attaches to a business rather than to any specific physical property. Thus, as a result of the merger, taxpayer acquired the good will attributable to the title search and insurance business of the Land Title and Trust Company. Such good will, we submit, was retained by taxpayer despite the alleged obsolescence and abandonment of the physical title plant, because tax-

[13] The District Court apparently conceded that the value of the good will should not be included in determining the value of the plant as of March 1, 1913 (R. 144), but overlooked the fact that the two witnesses who testified that the plant had a value of $1,250,000 and $1,000,000 respectively had both relied on the value of the good will in making their valuations of the plant and that there was no evidence establishing the value of the good will separately. (R. 75, 83, 90–91, 102–103.) In making its finding that the plant had value of $1,000,000 the court merely accepted the lower of these estimates.

payer continued to engage in the title search and insurance business. Accordingly, the deduction on account of the Land Title plant should be limited to its value on March 1, 1913, exclusive of any good will value attaching to the business in which it was then employed.

CONCLUSION

The decision of the court below is correct and should be affirmed. However, if it be held that taxpayer is entitled to some deduction, the case should be remanded to the District Court for correct determination of the amount allowable.

Respectfully submitted.

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DECEMBER, 1939.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

Treasury Regulations 74 (1929 ed.):

ART. 173. *Loss of useful value.*—When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 111 and article 561) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special

machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income.

ART. 201. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term and idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property in business, equal the basis of the property determined in accordance with section 113 and articles 591–604. Due regard must also be given to expenditures for current upkeep. In the case of property held by one person for life with remainder to another person, the deduction for depreciation shall be computed as if the life tenant were the absolute owner of the property so that he will be entitled to the deduction during his life, and thereafter the deduction, if any, will be

allowed to the remainderman. In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee.

ART. 202. *Depreciable property.*—The necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, nor to land apart from the improvements or physical development added to it. It does not apply to bodies of minerals which through the process of removal suffer depletion, other provisions for this being made in the Act. (See sections 23 (l) and 114 and articles 221–257 and 611.) Property kept in repair may, never-

theless, be the subject of a depreciation allowance. (See article 124.) The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business. No such allowance may be made in respect of automobiles or other vehicles used solely for pleasure, a building used by the taxpayer solely as his residence, nor in respect of furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be the subject of a depreciation allowance

ART. 206. *Obsolescence.*—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and cannot be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.

U. S. GOVERNMENT PRINTING OFFICE: 1920

SUPREME COURT OF THE UNITED STATES.

No. 229.—October Term, 1939.

The Real Estate-Land Title and Trust Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 15, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a Pennsylvania corporation, was formed in October 1927 as a result of a statutory consolidation or merger of three companies. Two of the constituent companies owned title search plants which were among the assets acquired by petitioner as a result of the consolidation. While it was known that two title plants would be acquired on the consolidation, there was at that time no definite plan for their disposition. But an immediate investigation was made and it was decided to store one of the plants in order to effect economies of operation. That was done substantially simultaneously with the consummation of the consolidation. About two months thereafter it was decided that the plant retained in use was adequate and that the one in storage would not be needed. Although for a brief period some slight use appears to have been made of the stored plant,[1] it was not kept up to date by the addition of current recordings. As a result it had only a salvage value by October 31, 1928. Meanwhile, negotiations for its sale had been unsuccessful.

In this action petitioner seeks a refund of income taxes for the fiscal year ended October 31, 1928, based on the refusal of the Collector of Internal Revenue to allow a deduction for obsolescence of this plant. It had been carried on the books of the constituent company at $275,000 and was brought into the consolidation at $800,000. The District Court, however, found that its value on

1 Evidence of use subsequent to the consolidation or merger is quite tenuous, the only specific instances occurring immediately prior to the actual consummation of the consolidation on October 31, 1927.

March 1, 1913, was $1,000,000; on October 31, 1928, $125,000—making an actual loss of $875,000, which that court allowed as a deduction for obsolescence for the taxable year 1928. It accordingly allowed a refund. That judgment was reversed by the Circuit Court of Appeals (102 F. (2d) 582). We granted certiorari because of the asserted conflict of that decision with *Crooks* v. *Kansas City Title and Trust Co.*, 46 F. (2d) 928.

Sec. 23(k) of the Revenue Act of 1928 (45 Stat. 791) allows as a deduction from gross income a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." Admittedly, if the deduction is allowed under this provision it must be for obsolescence, as there has been no exhaustion, wear or tear of the title plant within the meaning of the Act. Now it is true that in the popular sense a thing which is obsolete is one which is no longer used, a meaning which gives color to petitioner's claim for deduction since there is no question that the title plant here involved is no longer utilized to any degree whatsoever. But the term "allowance for obsolescence", as used in the Act and in the Treasury Regulations, has a narrower or more technical meaning than that derived from the common, dictionary definition of obsolete. The Treasury Regulations[2] state the circumstances under which an allowance for obsolescence of physical property may be allowed, viz., where such property is "being effected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its eco-

[2] Treasury Regulations 74, Art. 206, promulgated under the Revenue Act of 1928, provides in full:

"With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due." See also Bureau of Internal Revenue Bulletin "F", January, 1931.

nomic term of usefulness." This Court, without undertaking a comprehensive definition, has held that obsolescence for purposes of the revenue acts "may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value." *United States Cartridge Co.* v. *United States*, 284 U. S. 511, 516. See also *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648, 654. Such specific examples illustrate the type of "economic conditions" whose effect on physical property is recognized as obsolescence by the Treasury Regulations. Others could be mentioned which similarly cause or contribute to the relentless march of physical property to the junk pile. But in general, obsolescence under the Act connotes functional depreciation, as it does in accounting and engineering terminology.[3] More than non-use or disuse is necessary to establish it.[4] To be sure, reasons of economy may cause a management to discard a title plant either where it has become outmoded by improved devices or where it is acquired as a duplicate and therefore is useless. But not every decision of management to abandon facilities or to discontinue their use gives rise to a claim for obsolescence. For obsolescence under the Act requires that the operative cause of the present or growing uselessness arise from external forces which make it desirable or imperative that the property be replaced. What those operative causes may be will be dependent on a wide variety of factual situations. "New and modern methods" appear to have been one of the real causes of abandonment of the title plant in *Crooks* v. *Kansas City Title & Trust Co., supra.* Suffice it here to say that no such external causes are present, for the record shows little more than the desire of a management to eliminate one plant which was a needless duplication of another but which functionally was adequate.[5] The fact that fewer employees were required to operate

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[3] Kester, Advanced Accounting (3rd ed. 1933) ch. 10; Hatfield, Accounting (1927) ch. V; Saliers, Depreciation Principles and Applications (3rd ed. 1939) ch. 4; Kester, Depreciation (1924); Transactions, Amer. Soc. C. E., vol. 81, p. 1527 (1917); Marston & Agg, Engineering Valuation (1936) pp. 83-85.

[4] 2 Paul & Mertens, Law of Federal Income Taxation, § 20.114.

[5] According to petitioner's own witnesses, the discarded plant was a "more complete plant than any other plant in the City"; and it had a "background which went all the way back to William Penn".

the one retained than the one discarded is inconclusive here. For this is not the case of acquisition of a new plant to take the place of one outmoded or less efficient. Rather the conclusion is irresistible that the plant was discarded only as a proximate result of petitioner's voluntary action in acquiring excess capacity.

In view of this conclusion, we do not reach respondent's further objections to allowance of this claim on grounds of obsolescence.

But petitioner contends that in any event it has abandoned the plant and hence is entitled to a deduction under § 23(f) of the 1928 Act which allows a corporation to deduct "losses sustained during the taxable year and not compensated for by insurance or otherwise." Whether petitioner has satisfied those requirements we do not decide, for its claim for refund was based exclusively and solely on the ground that it was entitled to an allowance for obsolescence. Hence, in absence of a waiver by the government, *Tucker* v. *Alexander*, 275 U. S. 228, or a proper amendment, petitioner is precluded in this suit from resting its claim on another ground. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. There has been no amendment and there are no facts establishing a waiver.

Accordingly, the judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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